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HAROLD B. WILLEY,

No. [redacted] 109

Supreme Court of the United States

UNITED STATES OF AMERICA

IRVIN B. BEWLEY, Bowling Green, Ky.,
MRS. HELEN WITCHELL, Louisville, Ky.,
ELMER SANDERS, Louisville, Ky., - - - Petitioners,

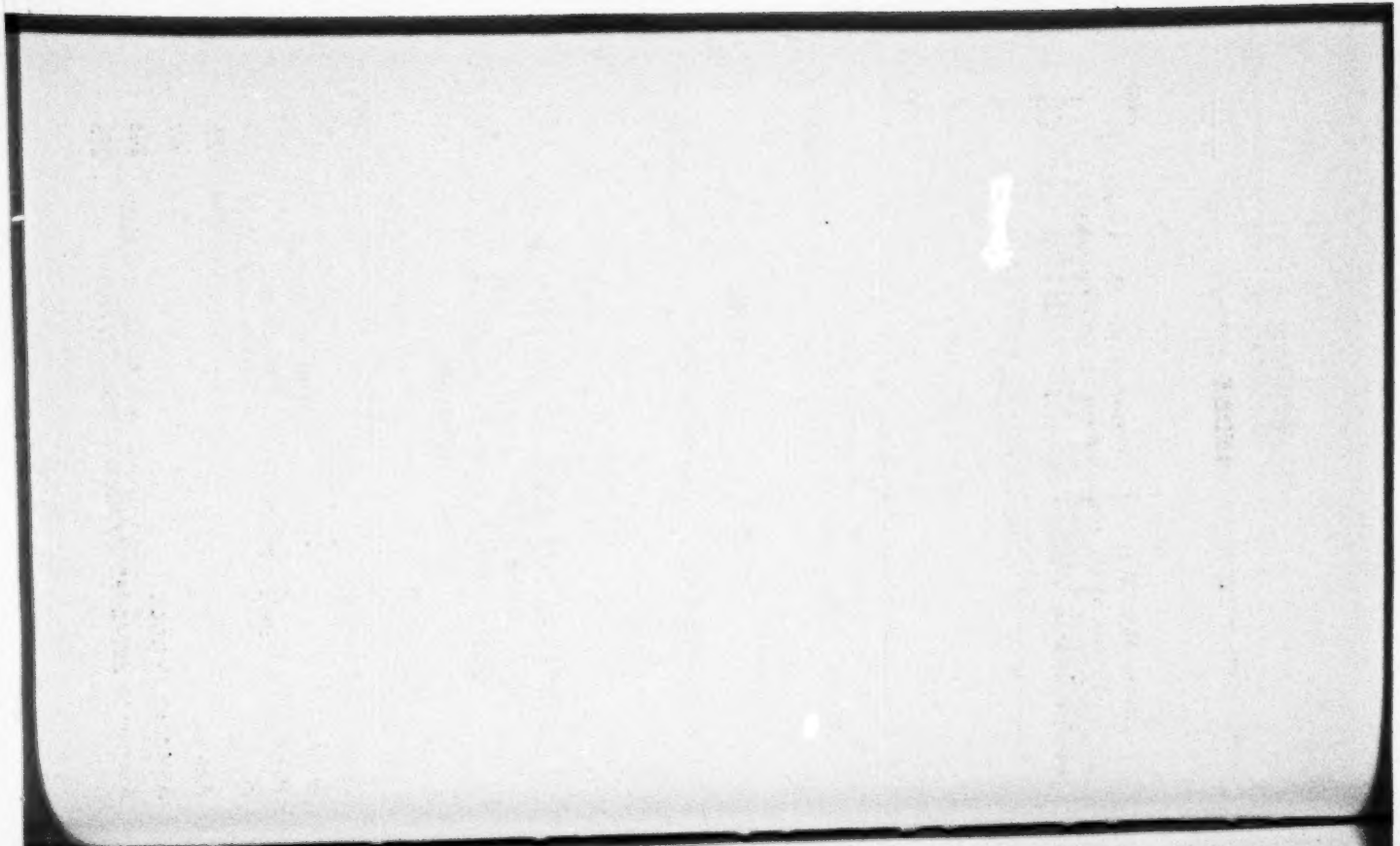
versus

JOHN HENDERSON, Bowling Green, Ky., - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY, WITH APPENDIX.

RODES K. MYERS,
Myers Bldg.,
Bowling Green, Ky.,
Counsel for Petitioners.

WESTERFIELD-SONTE CO., INCORPORATED, LOUISVILLE, KY.



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Supreme Court of the United States

UNITED STATES OF AMERICA

IRVIN B. BEWLEY, Bowling Green, Ky.,
MRS. HELEN WITCHELL, Louisville, Ky.,
ELMER SANDERS, Louisville Ky., - - *Petitioners,*

v.

JOHN HENDERSON, Bowling Green, Ky., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

This is a petition by Irvin B. Bewley, a resident of Bowling Green, Kentucky, Mrs. Helen Witchell, a resident of Louisville, Kentucky, and Elmer Sanders, a resident of Louisville, Kentucky, for this Court's writ of certiorari to review a judgment and opinion of the Court of Appeals, which is the court of last resort in the Commonwealth of Kentucky, and on a case in which the petitioners have exhausted all relief provided for them in the courts of the Commonwealth of Kentucky. The final date of the judgment of the highest court of the Commonwealth of Kentucky was March 5, 1954, under the following caption in the Court of Appeals of Kentucky:

COURT OF APPEALS OF KENTUCKY
File No. V-13-53.

Minnie Henderson's Admr.
(John Henderson), Indv., - - - Appellant,

v. APPEAL FROM WARREN CIRCUIT COURT, HON. JOHN B. RODES, JUDGE.

Irvin B. Bewley, - - - - - - - Appellee.

Helen Witchell, - - - - - - Appellant,

v. APPEAL FROM WARREN CIRCUIT COURT, HON. JOHN B. RODES, JUDGE.

Minnie Henderson's Admr.
(John Henderson), Indv., - - - Appellee.

Elmer Sanders, - - - - - - Appellant,

v. APPEAL FROM WARREN CIRCUIT COURT, HON. JOHN B. RODES, JUDGE.

Minnie Henderson's Admr.
(John Henderson), Indv., - - - Appellee.

II.

The jurisdiction of this Court to review the questions herein presented is invoked under 28 U. S. C. A., Sec. 1257(3) (June 25, 1948, c. 646, 62 Stat. 929). Also Tit. 28, Sec. 2103, U. S. C. A., and Sec. 2106, U. S. C. A. The judgment of the Court of Appeals of Kentucky on a petition for rehearing was entered on March 5, 1954, and became final on March 9, 1954, upon the

denial of the petition for rehearing and the forwarding of the mandate to the Warren Circuit Court, Bowling Green, Kentucky. The Warren Circuit Court rendered a judgment, a certified copy of which is in the printed record of the Court of Appeals attached hereto marked "Appendix I". The Court of Appeals of Kentucky entered an opinion affirming in part and reversing in part the judgment of the Warren Circuit Court and a copy of which is in the printed record of the Court of Appeals attached hereto marked "Appendix I." Pursuant thereto, the Warren Circuit Court, under a mandate from the Court of Appeals, entered a judgment, a certified copy of which is in the printed record of the Court of Appeals attached hereto marked "Appendix I."

The question involved, is the validity and the irrevocable status of the payees of "E" bonds issued by the Department of Treasury, pursuant to the provisions of the Second Liberty Bond Act as amended, Treasury Department Circular 653, Third Revision, and under the Treasury Regulations relative to the issuance of savings bonds and on page 14 thereof known as Sub-part L—Two Names—Co-ownership Form, and known as Section 315.45 and which under Subsection C thereof reads as follows:

> "(c) *Payment or reissue after the death of one Co-owner*—If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving coowner will be recognized as the sole and absolute owner of the bond and payment or reissue, as

though the bond were registered in his name alone, will be made only to such survivor. If the survivor requests reissue, he must present proof of the death of the other coowner. If a coowner dies after he has presented and surrendered the bond for payment, payment of the bond or check, if one has been issued, will be made to his estate (see subpart N)."

III.

QUESTION PRESENTED.

Under the sections of the United States Statutes and under the ruling that regulations of the Treasury Department have the full force and effect of Federal law, does a State Court have the right or jurisdiction to invalidate a contract made by a purchaser with the Department of Treasury of an "E" bond, which contract with the Government provided that such bonds should be made payable to the purchaser thereof (to-wit, in this instance, Mrs. Minnie Henderson) or to another person, which in this case are the petitioners and deny to the surviving payees, who, under said bonds, were co-owners, the right to the possession of said bonds or the proceeds thereof and, by a judgment, order such surviving co-owners to sign said bonds so that they can be cashed or be subjected to proceedings for contempt of court, by failing to so do?

IV.

SPECIFICATION OF ERROR TO BE URGED.

The Court of Appeals of the Commonwealth of Kentucky erred in holding that the petitioners had no interests in E bonds in which they were the irrevocable co-owners with Mrs. Minnie Henderson and on which bonds they were respectively designated as co-owners and upon the death of Mrs. Minnie Henderson became the survivors; that the action of said Court of Appeals of Kentucky invalidated a valid contract with the Department of Treasury of the United States of America over which it possessed no jurisdiction. The respective interests of the petitioners in said "E" bonds to be determined by this question are: Co-owner and survivor, Irvin B. Bewley, fifteen $1,000 "E" bonds; Co-owner and survivor, Mrs. Helen Witchell, two $1,000 "E" bonds; and Co-owner and survivor, Elmer Sanders, three $1,000 "E" bonds.

V.

CONCLUSION.

WHEREFORE, the petitioners pray that this petition for a writ of certiorari be granted and that this Court's writ of certiorari issue to the Court of Appeals of Kentucky for the purpose of reviewing the judgment and opinion and the question hereinbefore specified.

RODES K. MYERS,
Myers Bldg.,
Bowling Green, Ky.,
Counsel for Petitioners.

This is to certify that I am a member of the Bar of the Supreme Court of the United States and that copies of this Petition for Writ of Certiorari have been forwarded by mail to Honorable Marshall Funk, Attorney for Respondent, Bowling Green, Kentucky. This April 5, 1954.

RODES K. MYERS,
Counsel for Petitioners.

APPENDIX

The following is a copy of the petition filed September 27, 1952, in Warren Circuit Court.

WARREN CIRCUIT COURT

Irvin B. Bewley, - - - - - - - Plaintiff,

vs.

John Henderson, individually,
John Henderson, as the Administrator of the Estate of Mrs. Minnie Henderson, deceased, and the National Surety Corporation, Inc., Defendants.

PETITION IN EQUITY.

Comes the Plaintiff and states that he is a resident of Warren County, Kentucky, that the Defendant, John Henderson, is a resident of Warren County, Kentucky, that the Defendant, John Henderson, Administrator of the Estate of Minnie Henderson, deceased, is the duly acting and qualified administrator of the estate of Minnie Henderson, deceased, that the National Surety Corporation is a corporation organized and existing under the laws of the State of New York with authority to contract and be contracted with, sue and be sued under its corporate name, National Surety Corporation, and that W. W. Koven is the duly authorized agent of said corporation in Warren County, Kentucky.

The Plaintiff states that Mrs. Minnie Henderson, deceased, died intestate in and a resident of Warren County, Kentucky, on May 2, 1952; and that thereafter the Potter-Matlock Trust Company, a duly authorized banking and trust company of Bowling Green, Kentucky, was duly appointed the administrator of the estate of Minnie Henderson, deceased, but subsequently thereto and due to the con-

troversy between the parties hereinafter set forth, or for some other cause unknown to the Plaintiff, resigned as said administrator of said estate and that the Defendant, John Henderson, on his own motion, was appointed administrator of the estate of Minnie Henderson, deceased, and qualified by giving bond in the sum of $10,000.00 with the Defendant, National Surety Corporation as surety, on June 11, 1952, and as a result thereof is, as is alleged above, the duly appointed, qualified and acting administrator of said estate.

The Plaintiff states that at the time of the death of Minnie Henderson she had in her possession Government E. Bonds of the face value of $15,000.00, which were made payable to Minnie Henderson or Irvin B. Bewley, the Plaintiff herein; that at the time of her death Irvin B. Bewley became and is the sole owner of said bonds; that said bonds are more particularly described as follows:

$1,000.00	dated May, 1951	M	24213999	E
$1,000.00	dated May, 1951	M	24314000	E
$1,000.00	dated May, 1951	M	001	E
$1,000.00	dated May, 1951	M	002	E
$1,000.00	dated May, 1951	M	003	E
$1,000.00	dated Sept. 1951	M	24665550	E
$1,000.00	dated Sept. 1951	M	551	
$1,000.00	dated Sept. 1951	M	552	E
$1,000.00	dated Sept. 1951	M	554	E
$1,000.00	dated Sept. 1951	M	24665555	E
$1,000.00	dated Sept. 1951	M	556	E
$1,000.00	dated Sept. 1951	M	557	E
$1,000.00	dated Sept. 1951	M	558	E
$1,000.00	dated Sept. 1951	M	24665559	E
$1,000.00	dated Sept. 1951	M	562	E

Plaintiff states that the Defendant, John Henderson, as an individual and/or John Henderson, the duly appointed, qualified and acting administrator of the estate of Minnie Henderson, deceased, has said bonds in his possession and has refused to deliver the same to this Plaintiff and has illegally and unlawfully detained them in his possession since May 3, 1952, without right and has denied the Plaintiff the possession thereof.

Petition in Equity—Bewley

Plaintiff states that he is the owner of said bonds and is entitled to the immediate possession thereof.

Plaintiff states that although he has requested and demanded of the Defendant that he deliver possession of said bonds to this Plaintiff that he has wrongfully detained same and Plaintiff has been required to employ counsel and file this action.

Plaintiff states that the National Surety Corporation is made a party Defendant herein for the reason that they signed the bond of John Henderson as the Administrator of the Estate of Minnie Henderson, deceased, by which they guaranteed the safe keeping of any and all property that came to his hands by reason of his being administrator of said estate and the proper distribution thereof to whomever such property should be distributed, either by inheritance or direct ownership and that said surety be required, under its bond, to cause the delivery of said property to the Plaintiff by the Defendant, John Henderson, as the Administrator of the Estate of Minnie Henderson, deceased.

Plaintiff states that he does not know how many of said bonds have been lost or destroyed since they came into the possession of the Defendant, John Henderson, individually, or John Henderson, as the Administrator of the Estate of Minnie Henderson, deceased, but in the event any of the aforesaid bonds are missing or cannot be produced that the Defendant, John Henderson, individually, John Henderson, as the Administrator of the Estate of Minnie Henderson, deceased, and the National Surety Corporation should be required to either furnish said bonds and deliver them to the Plaintiff or to pay to this Plaintiff the cash value thereof as of the date of the filing of this suit.

Wherefore, Plaintiff prays judgment against the Defendant, John Henderson, individually, John Henderson as Administrator of the Estate of Minnie Henderson, deceased, for the possession and immediate delivery to the plaintiff of the following described bonds;

$1,000.00 dated May, 1951, M 24213999 E
$1,000.00 dated May, 1951, M 24314000 E
$1,000.00 dated May, 1951, M 001 E

$1,000.00 dated May, 1951, M	002	E
$1,000.00 dated May, 1951, M	003	E
$1,000.00 dated Sept. 1951, M	24665550	E
$1,000.00 dated Sept. 1951, M	551	E
$1,000.00 dated Sept. 1951, M	552	E
$1,000.00 dated Sept. 1951, M	554	E
$1,000.00 dated Sept. 1951, M	555	E
$1,000.00 dated Sept. 1951, M	556	E
$1,000.00 dated Sept. 1951, M	557	E
$1,000.00 dated Sept. 1951, M	558	E
$1,000.00 dated Sept. 1951, M	559	E
$1,000.00 dated Sept. 1951, M	562	E

and if any of said bonds are missing or destroyed and cannot be delivered to this Plaintiff, he prays judgment against said John Henderson, individually, John Henderson, Administrator of the Estate of Minnie Henderson, deceased, and the National Surety Corporation, the surety on his administrator's bond, for the value of such missing or destroyed bonds and for $1,000.00 damages for the wrongful detention of said bonds by the Defendant, and for his costs herein expended, and all other proper relief to which Plaintiff may appear entitled.

Attorney for Plaintiff.

The following is a copy of an order entered October 22, 1952, in Warren Circuit Court.

WARREN CIRCUIT COURT

Irvin B. Bewley, - - - - - - - Plaintiff,

vs.

John Henderson, &c., - - - - - - Defendants.

ORDER.

Came defendant, John Henderson, and filed special demurrer.

The following is a copy of the answer filed November 21, 1952, in Warren Circuit Court.

WARREN CIRCUIT COURT

Irvin B. Bewley, - - - - - - - Plaintiff,

vs.

John Henderson, &c., - - - - - - Defendants.

ANSWER.

Comes the defendant and without waiving his special demurrer herein before filed and without waiving his general demurrer hereinbefore filed, but while still insisting upon both of the same, files this his answer herein.

He states that all the allegations of the petition herein are untrue and therefore denied, except he does admit that he has in his possession certain bonds as follows:

$1,000.00 dated May, 1951, M 24213999 E
$1,000.00 dated May, 1951, M 24314000 E

$1,000.00	dated May, 1951, M	001 E
$1,000.00	dated May, 1951, M	002 E
$1,000.00	dated May, 1951, M	003 E
$1,000.00	dated Sept. 1951, M	24665550 E
$1,000.00	dated Sept. 1951, M	551 E
$1,000.00	dated Sept. 1951, M	552 E
$1,000.00	dated Sept. 1951, M	554 E
$1,000.00	dated Sept. 1951, M	555 E
$1,000.00	dated Sept. 1951, M	556 E
$1,000.00	dated Sept. 1951, M	557 E
$1,000.00	dated Sept. 1951, M	24665558 E
$1,000.00	dated Sept. 1951, M	559 E
$1,000.00	dated Sept. 1951, M	562 E

Defendant says further that although said bonds are listed by name as set out in the petition herein, they are in fact the sole and exclusive property of this defendant.

Defendant says in alternative that all of the funds, all of the money that went into the purchase of said bonds was the sole and exclusive property, funds and money of the defendant. That said funds were, pursuant to custom, contract and understanding between the defendant and his wife, kept and maintained in a safety deposit box at a local bank in Bowling Green, Kentucky; that the defendant's wife had access to said box and that she, without the defendant's knowledge or consent and against his wishes, converted the cash above referred to all into the bonds listed above, and that this was done without lawful authority and pursuant to the insistence, coercion and exercise of undue influence by the plaintiff on defendant's said wife.

Wherefore, defendant prays that the petition herein be dismissed at plaintiff's costs and that proper orders of this Court be entered directing the plaintiff or the Court Commissioner, for the plaintiff, to execute and deliver to the plaintiff, any and all necessary and proper ancillary papers of transfer calculated to put the bonds above referred to, or the equivalent in cash, in the defendant's name and subject to his absolute control.

(s) Marshall Funk,
Attorney for John Henderson.

The following is a copy of Amended Petition tendered for filing November 29, 1952, in Warren Circuit Court.

WARREN CIRCUIT COURT

Irvin B. Bewley, - - - - - - - Plaintiff,

vs.

John Henderson, &c., - - - - - - Defendants.

AMENDED PETITION.

Comes the Plaintiff, Irvin B. Bewley, and files this his amended petition herein, and states that in this action an actual controversy exists between the Plaintiff and the Defendant as to the legal ownership of the bonds listed in the petition; that the Plaintiff claims he is the owner of said bonds, that the Defendant claims that said bonds belong to the estate of the deceased, Mrs. Minnie Henderson.

Plaintiff states that said bonds are "E" bonds and that on the back of said bonds it is provided that the ownership of said bond is governed by the regulations of the Treasury Department of the United States; that under the Treasury regulations relative to the issuance of savings bonds and on page fourteen thereof there is a regulation known as "Subpart L—Two Names—Coownership Form," and known as Section 315.45, that a photostatic copy of the regulation is filed with the proof herein and that sub-section C thereof provides as follows:

"(c) *Payment or reissue after the death of one coowner.*

If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving coowner will be recognized as the sole and absolute owner of the bond and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor. If the survivor requests reissue, he must present proof of the

death of the other coowner. If a coowner dies after he has presented and surrendered the bond for payment, payment of the bond or check, if one has been issued, will be made to his estate (see Subpart N)."

Plaintiff states that he is the owner of the bonds described in the original petition herein and that the question presented to this Court, under the provisions of Section 639A-1 of the Civil Code of Practice, or the Declaratory Judgment Act, is—upon the death of Mrs. Minnie Henderson, who was a coowner of the bonds described in the petition, would the Plaintiff, as the other coowner, become the absolute owner of the bond as provided by the Federal Regulation in force and in effect at the time of the purchase of said bonds?

Plaintiff states that under the Declaratory Judgment Act, to-wit Chapter 4-A of the Civil Code of Practice, he is entitled to this declaration of rights in addition to the consequential relief asked for in the original petition.

Wherefore, Plaintiff prays the judgment of this Court, declaring that the Plaintiff is the legal owner of said bonds and further ordering and directing the Defendant to deliver the actual possession of said bonds to the Plaintiff or his counsel of record.

(s) Rodes K. Myers,
Attorney for Plaintiff.

The following is a copy of the First Amended Answer tendered December 29, 1952, in Warren Circuit Court.

WARREN CIRCUIT COURT

Irvin B. Bewley, - - - - - - - Plaintiff,

vs.

John I. Henderson, &c., - - - - - Defendants.

FIRST AMENDED ANSWER.

Come the defendants and file this their first amended answer herein and reaffirm all the allegations contained in the original answer to the petition and to the amended petition, and while still insisting upon the prior pleadings and motions filed by the defendants herein, say, for purposes of clarifying the issues herein, that all of the money which went into the purchase of all the bonds referred to in the pleadings herein was and is at all times referred to in the pleadings herein, the exclusive property of the defendant, John Henderson; that the same was earned exclusively by him through his own efforts and was never the property at law or in equity nor was it subject to the control of any person except the defendant, John I. Henderson; that the purchase price of said bonds was as alleged in the answer herein kept in cash or bonds jointly owned by John I. and Minnie Henderson on deposit or in a safety deposit box, rented and paid for by the defendant, John I. Henderson, to which box the defendant's wife, Minnie Henderson had access; that defendant's wife above mentioned fraudulently, illegally, improperly, without authority, against the express intentions, wishes, desires and instructions of the defendant and without any authority whatsoever misapplied said funds belonging to the defendant, John I. Henderson, to the extent of the purchase price of the bonds referred to in the pleadings herein by using the same for the purchase of said bonds registered in the name of Minnie I.

Henderson or the plaintiff herein as co-owner, all of which was done without the defendant, John I. Henderson's, knowledge and consent and against his wishes and instructions and pursuant to fraudulent intent as set out above. Defendant, John I. Henderson, says further that Minnie Y. Henderson, at said time was not of sound mind, nor capable of fully understanding the consequences of her act, but she was at said time suffering from a fatal disease, constantly under the influence of narcotics and of failing mind and memory and that she misapplied said funds as above set out as a result of duress and coercion on the part of the plaintiff.

Defendants say that because of the facts set out above, the bonds referred to in the pleadings herein, being the proceeds of the misapplication of the defendant, John I. Henderson's, funds, are held in constructive or resulting trust by John I. Henderson as administrator of the Estate of Minnie Henderson, and by the Department of the Treasury of the United States Government and by the United States Government as Trustees for the use and benefit of John I. Henderson, individually.

Wherefore, the defendants pray that the relief sought in the original answer herein be granted and that in addition thereto the Court specifically adjudicate that the bonds referred to in the pleadings herein are the property of John I. Henderson and are being held in trust for his use and benefit by John I. Henderson, Administrator of the Estate of Minnie Henderson, deceased and by the Department of the Treasury of the United States Government and by the United States Government and that appropriate orders of this Court be issued to effectuate the transfer of said bonds or the equivalent in cash to John I. Henderson, individually.

(s) Marshall Funk,
Attorney for Defendants.

The following is a copy of the answer to amended petition tendered December 29, 1952, in Warren Circuit Court.

WARREN CIRCUIT COURT

Irvin B. Bewley, - - - - - - - - Plaintiff,

vs.

John I. Henderson, &c., - - - - - Defendants.

ANSWER TO AMENDED PETITION.

Comes the defendant, and without waiving his motion to strike the amended petition herein, and without waiving his general demurrer thereto, hereby files this his answer herein.

The defendant denies each and every allegation of the original petition and the original petition as amended, except as admitted in the defendant's prior pleadings.

Wherefore, defendant prays that the petition and amended petition herein be dismissed at plaintiff's costs.

(s) Marshall Funk,
Attorney for Defendants.

The following is a copy of the Petition filed September 27, 1952 in Warren Circuit Court.

WARREN CIRCUIT COURT

Helen Witchell, - - - - - - - - Plaintiff,

v.

John Henderson, Individually,
John Henderson, as the Administrator of the Estate of Mrs. Minnie Henderson, Deceased, and the National Surety Corporation, Inc., - - - - - - - - Defendants.

PETITION IN EQUITY.

Comes the Plaintiff and states that she is a resident of Jefferson County, Kentucky, that the Defendant, John Henderson, is a resident of Warren County, Kentucky, that the Defendant John Henderson, Administrator of the Estate of Minnie Henderson deceased, is the duly acting and qualified administrator of the estate of Minnie Henderson, deceased; that the National Surety Corporation is a corporation organized and existing under the laws of the State of New York with authority to contract and be contracted with, sue and be sued under its corporate name, National Surety Corporation, and that W. W. Koven is the duly authorized agent of said corporation in Warren County, Kentucky.

The Plaintiff states that Mrs. Minnie Henderson, deceased, died intestate in and a resident of Warren County, Kentucky, on May 3, 1952; and that thereafter the Potter-Matlock Trust Company, a duly authorized banking and trust company of Bowling Green, Kentucky, was duly appointed the administrator of the estate of Minnie Henderson, deceased, but subsequently thereto and due to the controversy between the parties hereinafter set forth, or

for some other cause unknown to the plaintiff, resigned as said administrator of said estate and that the Defendant, John Henderson, on his own motion, was appointed administrator of the estate of Minnie Henderson, deceased, and qualified by giving bond in the sum of $10,000.00 with the Defendant, National Surety Corporation as surety, on June 11, 1952, and as a result thereof is, as is alleged above, the duly appointed, qualified and acting administrator of said estate.

The Plaintiff states that at the time of the death of Minnie Henderson she had in her possession Government E Bonds of the face value of $2,000.00, which were made payable to Minnie Henderson or Helen Witchell, the Plaintiff herein; that at the time of her death, Helen Witchell became and is the sole owner of said bonds; that said bonds are more particularly described as follows:

$1,000.00 dated May, 1951, M 24389092 E
$1,000.00 dated May, 1951, M 93 E

Plaintiff states that the Defendant, John Henderson, as an individual and/or John Henderson, the duly appointed, qualified and acting administrator of the estate of Minnie Henderson, deceased, has said bonds in his possession and has refused to deliver the same to this Plaintiff and has illegally and unlawfully detained them in his possession since May 3, 1952, without right and has denied the Plaintiff the possession thereof.

Plaintiff states that he is the owner of said bonds and is entitled to the immediate possession thereof.

Plaintiff states that although he has requested and demanded of the Defendant that he deliver possession of said bonds to this Plaintiff that he has wrongfully detained same and Plaintiff has been required to employ counsel and file this action.

Plaintiff states that the National Surety Corporation is made a party Defendant herein for the reason that they signed the bond of John Henderson as the Administrator of the Estate of Minnie Henderson, deceased, by which they guaranteed the safe keeping of any and all property that

came to his hands by reason of his being Administrator of said estate and the proper distribution thereof to whomever such property should be distributed, either by inheritance or direct ownership and that said surety be required, under its bond, to cause the delivery of said property to the Plaintiff by the Defendant, John Henderson, as the Administrator of the Estate of Minnie Henderson, deceased.

Plaintiff states that he does not know how many of said bonds have been lost or destroyed since they came into the possession of the Defendant, John Henderson, individually, or John Henderson, as the Administrator of the Estate of Minnie Henderson, deceased, but in the event any of the aforesaid bonds are missing or cannot be produced that the Defendant, John Henderson, individually, John Henderson, as the Administrator of the Estate of Minnie Henderson, deceased, and the National Surety Corporation should be required to either furnish said bonds and deliver them to the Plaintiff or to pay to this plaintiff the case value thereof as the date of the filing of this suit.

Wherefore, Plaintiff prays judgment against the Defendant, John Henderson, individually, John Henderson as Administrator of the Estate of Minnie Henderson, deceased, for the possession and immediate delivery to the Plaintiff of the following described bonds:

$1,000.00 dated May, 1951, M 24389092 E
$1,000.00 dated May, 1951, M 93 E

and if any of said bonds are missing or destroyed and cannot be delivered to this Plaintiff, she prays judgment against said John Henderson, individually, John Henderson, Administrator of the Estate of Minnie Henderson, deceased, and the National Surety Corporation, the surety on his administrator's bond, for the value of such missing or destroyed bonds and for $500.00 damages for the wrongful detention of said bonds by the Defendant, and for his costs herein expended, and all other proper relief to which Plaintiff may appear entitled.

(s) Rodes K. Myers,
Attorney for Plaintiff.

The following is a copy of the Answer filed November 21, 1952, in Warren Circuit Court.

WARREN CIRCUIT COURT

Helen Witchell, - - - - - - - - Plaintiff,

v.

John Henderson, Individually, &c., - - Defendants.

ANSWER.

Comes the defendant and without waiving his special demurrer herein before filed and without waiving his general demurrer herein before filed, but while still insisting upon both of the same files this his answer herein.

He states that all of the allegations of the petition herein are untrue and therefore denied, except he does admit that he has in his possession certain bonds as follows:

$1,000.00 dated May, 1951, M 24389092 E
$1,000.00 dated May, 1951, M 93 E

Defendant says further that although said bonds are listed by name as set out in the petition herein, they are in fact the sole and exclusive property of this defendant.

Defendant says in alternative that all of the funds, all of the money that went into the purchase of said bonds was the sole and exclusive property, funds and money of the defendant. That said funds were, pursuant to custom, contract and understanding between the defendant and his wife, kept and maintained in a safety deposit box at a local bank in Bowling Green, Kentucky; that the defendant's wife had access to said box and that she, without the defendant's knowledge or consent and against his wishes, converted the cash above referred to all into the bonds listed above, that this was done without lawful authority and pursuant to the insistence, coercion and ex-

ercise of undue influence by the plaintiff on defendant's said wife.

Wherefore defendant prays that the petition herein be dismissed at plaintiff's costs and that proper orders of this Court be entered directing the plaintiff or the Court Commissioner for the plaintiff to execute and deliver to the plaintiff any and all necessary and proper ancillary papers of transfer calculated to put the bonds above referred to or the equivalent in cash, in the defendant's name and subject to his absolute control.

(s) Marshall Funk,
Attorney for John Henderson.

The following is a copy of an Amended Petition tendered November 29, 1952, in Warren Circuit Court.

WARREN CIRCUIT COURT

Helen Witchell, - - - - - - - - Plaintiff,

v.

John Henderson, Individually, &c., - - Defendants.

AMENDED PETITION.

Comes the Plaintiff, Helen Witchell, and files this her amended petition herein, and states that in this action an actual controversy exists between the Plaintiff and the Defendant as to the legal ownership of the bonds listed in the petition; that the Plaintiff claims she is the owner of said bonds, that the Defendant claims that said bonds belong to the estate of the deceased, Mrs. Minnie Henderson.

Plaintiff states that said bonds are "E" bonds and that on the back of said bonds it is provided that the ownership of said bond is governed by the regulations of the Treasury Department of the United States; that under the Treasury regulations relative to the issuance of savings bonds and on page 14 thereof there is a regulation known as "Subpart L—TWO Names—COOWNERSHIP FORM," and known as Section 315.45, that a photostatic copy of the regulation is filed with the proof herein and that subsection C thereof provides as follows:

> "(c) *Payment or reissue after the death of one coowner.*—If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving coowner will be recognized as the sole and absolute owner of the bond and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor. If the survivor requests reissue, he must present proof of the death of the other coowner. If a coowner dies after he has presented and surrendered the bond for payment, payment of the bond or check, if one has been issued, will be made to his estate (see Subpart N)."

Plaintiff states that she is the owner of the bonds described in the original petition herein and that the question presented to this Court, under the provisions of Section 639A-1 of the Civil Code of Practice, or the Declaratory Judgment Act, is—upon the death of Mrs. Minnie Henderson, who was a coowner of the bonds described in the petition, would the Plaintiff, as the other coowner, become the absolute owner of the bond as provided by the Federal Regulation in force and in effect at the time of the purchase of said bonds?

Plaintiff states that under the Declaratory Judgment Act, to-wit: Chapter 4-A of the Civil Code of Practice, she is entitled to this declaration of rights in addition to the consequential relief asked for in the original petition.

Amended Petition—Witchell

Wherefore, Plaintiff prays the judgment of this Court, declaring that the Plaintiff is the legal owner of said bonds and further ordering and directing the Defendant to deliver the actual possession of said bonds to the Plaintiff or her counsel of record.

(s) Rodes K. Myers,
Attorney for Plaintiff.

The following is a copy of an order entered December 1, 1952, in Warren Circuit Court.

WARREN CIRCUIT COURT

Helen Witchell, - - - - - - - Plaintiff,

v.

John Henderson, Individually, &c., - - Defendants.

ORDER.

Came defendant, John Henderson, and filed objection to the filing of the amended petition, that has been tendered for filing herein.

The following is a copy of the Petition filed September 27, 1952 in Warren Circuit Court.

WARREN CIRCUIT COURT.

Elmer Sanders, - - - - - - - Plaintiff,

v.

John Henderson, individually,
John Henderson, as the Administrator of the Estate of Mrs. Minnie Henderson, Deceased, and the National Surety Corporation, Inc., - - - - - - - Defendants.

PETITION IN EQUITY.

Comes the Plaintiff and states that he is a resident of Jefferson County, Kentucky, that the Defendant, John Henderson, is a resident of Warren County, Kentucky, that the Defendant John Henderson, Administrator of the Estate of Minnie Henderson deceased, is the duly acting and qualified administrator of the estate of Minnie Henderson, deceased; that the National Surety Corporation is a corporation organized and existing under the laws of the State of New York with authority to contract and be contracted with, sue and be sued under its corporate name, National Surety Corporation, and that W. W. Koven is the duly authorized agent of said corporation in Warren County, Kentucky.

The Plaintiff states that Mrs. Minnie Henderson, deceased, died intestate in and a resident of Warren County, Kentucky, on May 3, 1952; and that thereafter the Potter-Matlock Trust Company, a duly authorized banking and trust company of Bowling Green, Kentucky, was duly appointed the administrator of the estate of Minnie Henderson, deceased, but subsequently thereto and due to the controversy between the parties hereinafter set forth, or for some other cause unknown to the Plaintiff, resigned

as said administrator of said estate and that the Defendant, John Henderson, on his own motion, was appointed administrator of the estate of Minnie Henderson, deceased, and qualified by giving bond in the sum of $10,000.00 with the Defendant, National Surety Corporation as surety, on June 11, 1952, and as a result thereof is, as is alleged above, the duly appointed, qualified and acting administrator of said estate.

The Plaintiff states that at the time of the death of Minnie Henderson she had in her possession Government E Bonds of the face value of $3,000.00, which were made payable to Minnie Henderson or Elmer Sanders, the Plaintiff herein; that at the time of her death, Elmer Sanders became and is the sole owner of said bonds; that said bonds are more particularly described as follows:

$1,000.00 dated May 1951, M 24389089 E
$1,000.00 dated May 1951, M 90 E
$1,000.00 dated May 1951, M 91 E

Plaintiff states that the Defendant, John Henderson, as an individual and/or John Henderson, the duly appointed, qualified and acting administrator of the estate of Minnie Henderson, deceased, has said bonds in his possession and has refused to deliver the same to this Plaintiff and has illegally and unlawfully detained them in his possession since May 3, 1952, without right and has denied the Plaintiff the possession thereof.

Plaintiff states that he is the owner of said bonds and is entitled to the immediate possession thereof.

Plaintiff states that although he has requested and demanded of the Defendant that he deliver possession of said bonds to this Plaintiff that he has wrongfully detained same and Plaintiff has been required to employ counsel and file this action.

Plaintiff states that the National Surety Corporation is made a party Defendant herein for the reason that they signed the bond of John Henderson as the Administrator of the Estate of Minnie Henderson, deceased, by which they guaranteed the safe keeping of any and all property that came to his hands by reason of his being

Administrator of said estate and the proper distribution thereof to whomever such property should be distributed, either by inheritance or direct ownership and that said surety be required, under its bond, to cause the delivery of said property to the Plaintiff by the Defendant, John Henderson, as the Administrator of the Estate of Minnie Henderson, deceased.

Plaintiff states that he does not know how many of said bonds have been lost or destroyed since they came into the possession of the Defendant, John Henderson, individually, or John Henderson, as the Administrator of the Estate of Minnie Henderson, deceased, but in the event any of the aforesaid bonds are missing or cannot be produced that the Defendant, John Henderson, individually, John Henderson, as the Administrator of the Estate of Minnie Henderson, deceased, and the National Surety Corporation should be required to either furnish said bonds and deliver them to the Plaintiff or to pay to this Plaintiff the case value thereof as of the date of the filing of this suit.

Wherefore, Plaintiff prays judgment against the Defendant, John Henderson, individually, John Henderson, as Administrator of the Estate of Minnie Henderson, deceased, for the possession and immediate delivery to the Plaintiff of the following described bonds:

$1,000.00 dated May 1951, M 24389089 E
$1,000.00 dated May 1951, M 90 E
$1,000.00 dated May 1951, M 91 E

and if any of said bonds are missing or destroyed and cannot be delivered to this Plaintiff, he prays judgment against said John Henderson, individually, John Henderson, Administrator of the Estate of Minnie Henderson, deceased, and the National Surety Corporation, the surety on his administrator's bond, for the value of such missing or destroyed bonds and for $500.00 damages for the wrongful detention of said bonds by the Defendant, and for his costs herein expended, and all other proper relief to which Plaintiff may appear entitled.

(s) Rodes K. Myers,
Attorney for Plaintiff.

The following is a copy of an order entered October 22, 1952 in Warren Circuit Court.

WARREN CIRCUIT COURT.

Elmer Sanders, - - - - - - - Plaintiff,

v.

John Henderson, Individually &c., - - Defendants.

ORDER.

Came defendant, John Henderson, and filed special demurrer.

The following is a copy of the Answer filed November 21, 1952 in Warren Circuit Court.

WARREN CIRCUIT COURT.

Elmer Sanders, - - - - - - - Plaintiff,

v.

John Henderson, Individually, &c., - - Defendants.

ANSWER.

Comes the defendant and without waiving his special demurrer herein before filed and without waiving his general demurrer herein before filed, but while still insisting upon both of the same files this his answer herein.

He states that all the allegations of the petition herein are untrue and therefore denied, except he does admit that he has in his possession certain bonds as follows:

$1,000 dated May 1951, M	24389089	E
$1,000 dated May 1951, M	90	E
$1,000 dated May 1951, M	91	E

Defendant says further that although said bonds are listed by name as set out in the petition herein, they are in fact the sole and exclusive property of this defendant.

Defendant says in alternative that all of the funds, all of the money that went into the purchase of said bonds was the sole and exclusive property, funds and money of the defendant. That said funds were, pursuant to custom, contract and understanding between the defendant and his wife, kept and maintained in a safety deposit box at a local bank in Bowling Green, Kentucky; that the defendant's wife had access to said box and that she, without the defendant's knowledge or consent and against his wishes, converted the cash above referred to all into the bonds listed above, and that this was done without lawful authority and pursuant to the insistence, coercion and exercise of undue influence by the plaintiff on defendant's said wife.

Wherefore, defendant prays that the petition herein be dismissed at plaintiff's costs and that proper orders of this Court be entered directing the plaintiff or the Court Commissioner for the plaintiff to execute and deliver to the plaintiff any and all necessary and proper ancillary papers of transfer calculated to put the bonds above referred to, or the equivalent in cash, in the defendant's name and subject to his absolute control.

(s) Marshall Funk,
Attorney for John Henderson.

The following is a copy of an Amended Petition tendered November 29, 1952 in Warren Circuit Court.

WARREN CIRCUIT COURT.

Elmer Sanders, - - - - - - - - Plaintiff,

v.

John Henderson, Individually, &c., - - Defendants.

AMENDED PETITION.

Comes the Plaintiff Elmer Sanders, and files this his amended petition herein, and states that in this action an actual controversy exists between the Plaintiff and the Defendant as to the legal ownership of the bonds listed in the petition; that the Plaintiff claims he is the owner of said bonds, that the Defendant claims that said bonds belong to the estate of the deceased, Mrs. Minnie Henderson.

Plaintiff states that said bonds are "E" bonds and that on the back of said bonds it is provided that the ownership of said bond is governed by the regulations of the Treasury Department of the United States, that under the Treasury regulations relative to the issuance of savings bonds and on page fourteen thereof there is a regulation known as "Subpart L—TWO NAMES—COOWNERSHIP FORM," and known as Section 315.45, that a photostatic copy of the regulation is filed with the proof herein and that sub-section C thereof provides as follows:

"(c) *Payment or reissue after the death of one coowner.* If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving coowner will be recognized as the sole and absolute owner of the bond and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor. If the survivor

requests reissue, he must present proof of the death of the other coowner. If a coowner dies after he has presented and surrendered the bond for payment, payment of the bond or check, if one has been issued, will be made to his estate (see Subpart N)".

Plaintiff states that he is the owner of the bonds described in the original petition herein and that the question presented to this Court, under the Provisions of Section 639A-1 of the Civil Code of Practice, or the Declaratory Judgment Act, is—upon the death of Mrs. Minnie Henderson, who was a coowner of the bonds described in the petition, would the Plaintiff, as the other coowner, become the absolute owner of the bond as provided by the Federal Regulation in force and in effect at the time of the purchase of said bonds?

Plaintiff states that under the Declaratory Judgment Act, towit: Chapter 4-A of the Civil Code of Practice, he is entitled to this declaration of rights in addition to the consequential relief asked for in the original petition.

Wherefore, Plaintiff prays the judgment of this Court, declaring that the Plaintiff is the legal owner of said bonds and further ordering and directing the Defendant to deliver the actual possession of said bonds to the Plaintiff or his counsel of record.

(s) Rodes K. Myers,
Attorney for Plaintiffs.

The following is a copy of the Answer to Amended Petition tendered December 29, 1952 in Warren Circuit Court.

WARREN CIRCUIT COURT.

Elmer Sanders, - - - - - - - - - Plaintiff,

v.

John I. Henderson, et al., - - - - - Defendants.

ANSWER TO AMENDED PETITION.

Comes the defendant, and without waiving his motion to strike the amended petition herein, and without waiving his general demurrer thereto, hereby files this his answer herein.

The defendant denies each and every allegation of the original petition and the original petition as amended, except as admitted in the defendant's prior pleadings.

Wherefore, defendant prays that the petition and amended petition herein be dismissed at plaintiff's costs.

(s) Marshall Funk,
Attorney for Defendants.

WARREN CIRCUIT COURT
No. 20400.

Irvin B. Bewley, - - - - - - - Plaintiff,

vs.

John Henderson, Individually,
John Henderson, as the Administrator of the Estate of Mrs. Minnie Henderson, deceased, and the National Surety Corporation, Inc., Defendants.

NOTICE.

The Defendant, John Henderson, is hereby notified that the Plaintiff will proceed to take the deposition of John Henderson, as if upon cross-examination to be read in behalf of the Plaintiff in the trial of the above-styled action, at the law offices of Rodes K. Myers, Bowling Green, Kentucky, at the hour of 11:00 A. M., on Saturday, October 4, 1952.

This September 27, 1952.

Rodes K. Myers,
Attorney for Plaintiff.

W. W. Koven
423½ Park Row

(On Reverse Side)

Executed on John Henderson, Individually and John Henderson, as Administrator of Estate of Minnie Henderson, deceased, and The National Surety Corp. Through, W. W. Kove, Agent. This Sept. 27, 1952.

Mrs. Edith Hodges, Sheriff,
By Asher Miller,
Deputy Sheriff.

No. 20400

WARREN CIRCUIT COURT

Irvin B. Bewley, Ptff.

vs. NOTICE

John Henderson, Individually,
John Henderson, as Administrator
of the Estate of Mrs. Minnie Henderson,
deceased, and the Nationtl Surety
Corporation, Inc., Defts.

Return to:
Rodes K. Myers,
Atty, for Plaintiff

WARREN CIRCUIT COURT

Irvin B. Bewley, - - - - - - - - Plaintiff,

vs. 20400

John Henderson, et al., - - - - - Defendants,

and

Helen Witchell, - - - - - - - - Plaintiff,

vs. 20392

John Henderson, et al., - - - - - Defendants,

and

Elmer Sanders, - - - - - - - - Plaintiff,

vs. 20399

John Henderson, et al., - - - - - Defendants.

DEPOSITION OF IRVIN B. BEWLEY
—Filed July 3, 1953.

Depositions in the first-captioned case, taken pursuant to notice attached hereto, and the depositions in the case of Witchell vs. Henderson and the case of Sanders vs. Henderson taken pursuant to agreement of counsel, at the law offices of Rodes K. Myers, Bowling Green, Kentucky, on November 22, 1952, at the hour of 10:00 A. M. Said depositions to be read in behalf of the Plaintiffs in the above-styled causes. The Plaintiff in each cause was present in person and by counsel, Mr. Rodes K. Myers. The Defendant was present in person and by counsel, Mr. Marshall Funk. Upon examination of each Plaintiff, the rule was applied.

The deposition of Irvin B. Bewley, who being first duly sworn, testified as follows:

Deposition of Irvin B. Bewley

Direct Examination by Mr. Rodes K. Myers.

Q. 1. You are Mr. Irvin Bewley?

A. Yes.

Q. 2. Where do you reside, Mr. Bewley?

A. 1358 Stubbin.

Q. 3. How old are you?

A. Twenty-nine.

Q. 4. Did you know Mrs. Minnie Henderson during her lifetime?

A. Yes, sir.

Mr. Funk: Defendant objects to the taking of this Plaintiff's deposition. He is here pursuant to notice over the protest and objections to each and every question and answer.

Mr. Myers: What's your ground?

Mr. Funk: Let's see what the questions are.

Q. 5. How long did you know Mre. Henderson, no conversations and no transactions, but how long did you know her?

A. Ever since I was old enough to remember until the time she died.

Q. 6. Where did you reside during her lifetime or part of it?

A. I lived with Mrs. Henderson everywhere she lived.

Q. 7. How old were you when you started to live with Mrs. Henderson?

A. I wasn't old enough to remember.

Q. 8. In other words, it was during infancy?

A. Yes.

Q. 9. How old were you when you ceased to live there all the time as a permanent resident?

A. About when I become eighteen years old.

Q. 10. Since that time and until her death did you still return to their home?

A. Yes, sir, after the war I returned.

Q. 11. How long were you in the war?

A. Two years.

Q. 12. Are you now married?

A. Yes, sir. I was married before that.

Deposition of Irvin B. Bewley

Q. 13. When you married you moved out to a different location?

A. No, sir. I worked in the ship yard at Louisville for about thirteen months, then I got married while I was working in the ship yard, then I had to go into the army. I stayed there two years. When I returned I lived with them a while until I found a place to live.

Q. 14. Did you, after Mrs. Henderson's death, discover in the hands of the Potter-Matlock Trust Company certain bonds that were made to you?

A. Yes, sir.

Note: By agreement of counsel the stenographer is authorized to copy the serial number of bonds, their face amount into this record, subject to a later check.

$1,000.00	dated May, 1951	M	24213999 E
$1,000.00	dated May, 1951	M	24314000 E
$1,000.00	dated May, 1951	M	001 E
$1,000.00	dated May, 1951	M	002 E
$1,000.00	dated May, 1951	M	003 E
$1,000.00	dated Sept. 1951	M	24665550 E
$1,000.00	dated Sept. 1951	M	551 E
$1,000.00	dated Sept. 1951	M	552 E
$1,000.00	dated Sept. 1951	M	554 E
$1,000.00	dated Sept. 1951	M	24665555 E
$1,000.00	dated Sept. 1951	M	24665556 E
$1,000.00	dated Sept. 1951	M	557 E
$1,000.00	dated Sept. 1951	M	558 E
$1,000.00	dated Sept. 1951	M	559 E
$1,000.00	dated Sept. 1951	M	562 E

Q. 15. To whom were those bonds made payable?

A. To me and her.

Q. 16. To Mrs. Minnie Henderson and/or you?

A. Yes, sir.

Q. 17. Have you demanded those bonds to be turned over to you?

A. Yes, sir.

Q. 18. And then filed this suit for them to be turned over to you?

A. Yes, sir.

Deposition of Irvin B. Bewley

Cross-examniation by Mr. Marshall Funk.

Q. 1. What kin were you to Mrs. Henderson?

A. No kin, so they tell me. She raised me.

Q. 2. What date was it you moved out of the Henderson house?

A. I don't know the exact date.

Q. 3. What was the approximate date?

A. That would be hard to figure. It must have been—I could find the exact date when I bought the house, but it must have been in 1946, that is after I come back from the war. I stayed with them maybe two months.

Q. 4. What I would like to find out is when you left the home as one of the members of the family.

A. When I was eighteen years old.

Q. 5. What year was that, and what month?

A. I believe it was September, 1942—I think—I am not positive.

Q. 6. You stayed away working in the ship yard and in the army until 1946?

A. In December 1945 I got out of the army and come home.

Q. 7. And stayed there two months the last of 1945 and 1946?

A. Yes, sir.

Q. 8. Then you married?

A. I was married before.

Q. 9. Then you bought a house?

A. Yes, sir.

Q. 10. That was when you moved?

A. Yes, sir.

Q. 11. Will you determine the date you bought the house and call the stenographer and tell her?

A. Yes, sir.

Q. 12. That will be the date you moved out finally?

A. Yes, sir.

Reporter's note: Witness, advised reporter that the house was purchased about April 1, 1946.

Q. 13. I believe you testified you don't remember when you first moved in with the Hendersons?

A. No, sir. I was too young.

Q. 14. I believe you testified that you discovered these bonds, I believe was the way the question was put, after her death?

A. I was present when they opened it.

Q. 15. Did you know anything about them prior to that time?

A. I didn't know how many or anything like that.

Q. 16. And you lived as a member of the household from the latter part of your infancy until the time you can remember and until you were eighteen, is that right?

A. Yes.

Q. 17. During that period of time did Mrs. Henderson ever do any outside work?

A. What do you mean?

Mr. Myers: Objection on the grounds that enters into conversations and transactions with the deceased and makes this witness incompetent on those particular points, and with the further statement, counsel for Plaintiff has no objection to going into that field if counsel for Defendant desires.

Mr. Funk: It is very obvious the question does not call for any answer as to conversations with the deceased. I ask the Secretary to read the question back.

Reporter's note: Question 17 was read.

Q. 18. I mean work outside the home for a salary or any kind of income.

A. You still haven't explained yourself.

Q. 19. Don't you know what I mean?

A. Yes, sir, but you haven't explained yourself, do you mean did she do any manual work?

Q. 20. No. I mean did she have any employment outside of the home resulting in income.

A. Sure. She bought and traded houses, if that's what you mean. We lived several different places.

Q. 21. Can you name any houses she bought and sold that you know of?

A. Yes, sir.

Q. 22. Name them, if you will.

A. 1211 Kentucky Street.

Q. 23. From whom did she buy it?

A. I don't know that, sir. That's been a long time ago.

Q. 24. To whom did she sell it?

A. I have forgot that too.

Q. 25. Did the family ever live in the house?

A. Yes, sir. I lived with them.

Q. 26. For a period of how long approximately?

A. The entire time they owned the house.

Q. 27. Well, how long?

Mr. Myers: To keep from being longer, he will supply the date of purchase and date of sale.

A. No answer.

Q. 28. Give just the approximate time.

A. I would say two or three years.

Q. 29. Can you name any other property?

A. Yes, sir, we lived on the Russellville Road.

Q. 30. From whom did she buy it?

A. She bought that from J. E. Payne.

Q. 31. To whom did she sell it?

A. I did know her name, but I have forgot, but she is a teacher on the hill.

Q. 32. Did you live in that house?

A. Yes, sir.

Q. 33. About how long?

A. I lived there some time, I went in the service—I lived there about two years.

Q. 34. Can you think of any more?

A. We lived where he is living now, at 219 Seventh Street.

Q. 35. When did she buy that?

A. I don't know. I was too little to remember.

Q. 36. That is where you were living when you first remember?

A. Yes, sir.

Q. 37. About when did you leave there, when did the family move away from there, to your best recollection?

A. I don't remember. That was the first place we lived.

Q. 38. About how old were you when you moved away from there?

A. I probably was thirteen or fourteen years old, the best I can remember now.

Q. 39. That would be the year about what?

A. I am twenty-nine now.

Q. 40. Thirteen from twenty-nine would be sixteen years ago, about 1936?

A. Somewhere along there, 1935 or 1936. That's not definite, but that's somewhere close.

Q. 41. You left about 1935 or 1936, that was the first move you made, is that right?

A. Yes, sir.

Q. 42. Is that the first house you remember selling?

A. She kept that, but she bought the other one.

Q. 43. That's the one on Kentucky Street?

A. Yes, sir.

Q. 44. I believe you remained on Kentucky Street about two or three years?

A. Yes, sir.

Q. 45. And sold it about 1939?

A. No, sir, she kept that for a little period and they built one on the Russellville Road and we moved there. Later she sold the one on Kentucky. No, she sold that one and moved on Kentucky Street, while I was in service she bought on 13th Street.

Q. 46. Has it been sold?

A. Sometime while I was in the service?

Q. 47. And later she bought the one up on—

A. I believe 13th or 14th Street.

Q. 48. When she left Kentucky Street I believe she moved out into the country?

A. One time, yes, sir.

Q. 49. What place?

A. The one they built on the Russellville Road on the other side of McClard's. A little rock house.

Q. 50. And lived there a couple of years?

A. Yes, sir, I did.

Q. 51. It was about 1940 when you left there?

A. Something like that. I was going to school at that time. That is where I left and went to the ship yard. They still lived there. The way I heard it, I don't know, but while I was away they sold that and moved back to Kentucky Street and later on, I still wasn't here, it was during the war, they bought up on 14th Street next door to Mr. Pryor, there is where I come back and knowed they was living. Later she sold that and they moved back on Seventh Street. She sold that one to Mr. Duff and moved back there. From there they moved to the country.

Q. 52. Where was that?

A. On the Plum Springs Road.

Q. 53. About when?

A. About 1950, something like that.

Q. 54. You say you started out saying she did this buying, then you in this conversation said they did, which was it?

A. She usually done the buying.

Q. 55. Where did she get the money to start with?

A. That I don't know definitely. She had it herself, I guess.

Q. 56. Do you know where she got it?

Mr. Myers: If you know, tell it. Do you know?

A. Yes, part of it.

Q. 57. Where?

A. She got it from trading house to house.

Q. 58. Where did she start?

A. I was too little to remember. They first started, I guess.

Q. 59. Outside of this house trading you have told about, do you know of anything else she did to make any money?

A. No, sir.

Q. 60. You never observed or knew of her working for a salary anywhere?

A. No, sir.

Q. 61. You never observed or knew of her having any income from any other source except what you have told about trading these houses?

A. And renting some other houses.

Q. 62. Were there any other houses that you know of?

A. Him and her owned other houses, I think. I don't know that definitely.

Q. 63. You don't know of any besides the ones you have told about?

A. Yes, sir.

Q. 64. What ones?

A. They owned two more right besides 212 Seventh Street.

Q. 65. When did they acquire them?

A. I was too little to remember. The one on Kentucky is the first one I remember.

Q. 66. Were they ever sold?

A. I don't think so. They still belong to them.

Q. 67. Do you know of any others?

A. One on Kentucky Street.

Q. 68. You have mentioned one on Kentucky Street.

A. This is another.

Q. 69. What's the address of the first one?

A. 1211 on Kentucky is where I lived. These others I didn't live at.

Q. 70. Where is the other one?

A. Between Sixth and Seventh. I don't know the number.

Q. 71. When did they acquire it?

A. I don't remember.

Q. 72. When was it sold?

A. I barely remember them buying that one.

Q. 73. When was it sold?

A. I think they still own it.

Q. 74. Do you know of any more?

A. Yes, sir.

Q. 75. All right. Give the location and about when they were bought and sold.

A. I don't know the time it was bought, but they owned the corner house underneath the overhead bridge, that would be Sixth Street, and the one next to it.

Q. 76. When were they acquired?

A. I don't know. I was too little to remember.

Q. 77. Do you know about when it was sold?

A. I can make a guess. About 1930, I guess.

Q. 78. I believe you said two houses at that location?

A. Yes, sir.

Q. 79. Do you know of any more?

A. No, sir. That's all.

Q. 80. You never did loan Mrs. Henderson any money, did you?

Mr. Myers: I object definitely to any conversation relative to a transaction.

A. No answer given.

Mr. Myers: But giving you permission to inquire about same if you desire to go into that field.

Still no reply from witness.

Mr. Funk: That's all.

Signature waived.

Deposition of Mrs. Helen Witchell

Also the deposition of Mrs. Helen Witchell, Plaintiff in the second captioned suit herein, who being first duly sworn, deposed as follows:

Direct Examination by Mr. Rodes K. Myers.

Q. 1. You are Mrs. Helen Witchell?

A. I am.

Mr. Funk: Objection. Defendant objects to this party plaintiff's testifying in the case at the time and objects to each and all questions and answers.

Q. 2. Where do you reside, Mrs. Witchell?

A. 601½ E. Woodlawn, and you have been sending letters to 1834 Baird.

Q. 3. Did you know Mrs. Minnie Henderson during her lifetime?

A. Yes.

Q. 4. What relationship was she to you?

A. She was my mother's half sister.

Q. 5. At her death or prior to her death did you discover that you were owner of certain E bonds which are listed in your petition?

A. Only by being sued.

Q. 6. That was when Mr. John Henderson sued you—that was the first information you had about them?

A. That's my information.

Q. 7. You learned those bonds were in her name or yours?

A. Yes.

Mr. Myers: Can we have the stenographer list the bonds, their numbers and amounts subject to check, from the original petition?

Mr. Funk: Yes.

Note: Following are the bonds listed in the petition.

$1,000.00 dated May, 1951, M 24389092 E
$1,000.00 dated May, 1951, M 93 E

Q. 8. And you are the Helen Witchell who is named in those bonds?

A. Yes.

Mr. Myers: That's all.

Deposition of Mrs. Helen Witchell

Cross-examination by Mr. Marshall Funk.

Q. 1. Mrs. Witchell, how long have you lived at that address you just gave?

A. A year this last October, the 27th day.

Q. 2. Where did you live before?

A. 1834 Baird Street.

Q. 3. How long did you live there?

A. I moved there in 1944, in December, I believe.

Q. 4. Where did you live before that?

A. 646 South 24th Street.

Q. 5. How long did you live there?

A. I lived there from 1940 to 1944.

Q. 6. Do you remember where you lived before that?

A. At Kyrock, Kentucky.

Q. 7. How long did you live at Kyrock?

A. We moved there when I was fourteen, I believe it was—in 1923 and I left there in 1940.

Q. 8. Where did you live before that?

A. We moved from Woodbury, Kentucky, and that's where I done most of my schooling.

Q. 9. You were born and raised in Woodbury?

A. I was not born in Woodbury. I would not be sure, but I believe it was in Barren.

Q. 10. You moved to Woodbury when a little girl?

A. I was four when we moved to Woodbury.

Q. 11. From Barren County, you think?

A. Yes.

Q. 12. And lived there until you went through school?

A. Yes. I was in the 8th grade when we went to Kyrock, and I finished school there.

Q. 13. You never lived in Bowling Green?

A. I think mother said her and daddy lived here, but I didn't.

Q. 14. When did you last see Mrs. Henderson?

A. You mean alive?

Q. 15. Yes, ma'am.

A. When she was at her home after she came back from Louisville the last time, I don't remember just when.

Q. 16. To your best memory, about when was it?

A. I couldn't say.

Q. 17. How long before she died?

A. Not too long before she died, but I couldn't say just how long.

Q. 18. A few weeks, a few months or a few years?

A. Months I imagine, because she come to Bowling Green hospital and I didn't get to see her. I had a tiny baby and I couldn't leave. That was one reason I didn't get to see her more than I did.

Q. 19. Would you say a few weeks or months?

A. It must have been months, I can't say for certain.

Q. 20. About how many months, to your best memory?

A. I should be able to remember the month I came.

Q. 21. When did Miss Minnie die?

A. I couldn't say that right now?

Q. 22. What year was it?

A. Last year.

Q. 23. But you don't remember the month?

A. No, I am afraid I couldn't.

Q. 24. You saw her a matter of a few months before she died, when did you see her next before that time?

A. As well as I remember, I saw her when she left the hospital. I can't say—

Q. 25. Did you see her any time except once, a matter of a few months before she died?

A. Yes, sir, when she was in the hospital I seen her regular.

Mr. Myers: What hospital?

Witness: That was in Louisville.

Q. 26. When was that?

A. The first time was in June, I believe.

Q. 27. What year?

A. That must have been 1950 or 1951.

Q. 28. Was she back there again?

A. Yes, she came again and I also went to see her that time every day.

Q. 29. When did you see her before that?

A. Before she was in the hospital?

Q. 30. Yes.

A. I don't know. We usually got to see her once or twice or three times a year. My brother came, and I would come with him,

Q. 31. What is your brother's name?

A. Elmer Sanders.

Q. 32. He lives in Louisville?

A. Yes.

Q. 33. Mrs. Henderson and your mother were half sisters?

A. Yes.

Q. 34. What was your mother's name?

A. Mary Nancy.

Q. 35. What was Miss Minnie Henderson's maiden name?

A. Right now I couldn't tell you.

Mr. Funk: That's all.

Redirect Examination by Mr. Myers.

Q. 1. Mrs. Witchell, outside of Mr. Henderson, as the husband of Mrs. Minnie Henderson, are you and your brother, Mr. Sanders, the closest blood relatives she had at the time of her death?

A. The closest besides my mother.

Recross-examination by Mr. Funk.

Q. 1. Where does your mother live, Mrs. Witchell?

A. She lives at 3714 Parthenia.

Q. 2. In Louisville?

A. Yes. Right at the back of Nichols Hospital.

Q. 3. Is she a widow?

A. No, she isn't. They own their own home, daddy built.

Q. 4. What does your daddy do?

A. At present contracting work.

Q. 5. What does your husband do?

A. He works for a construction company.

Q. 6. Where?

A. In Louisville.

Q. 7. What Company?

A. Emory Powell.

Q. 8. What kind of work does he do?

A. He is a common laborer.

Q. 9. Do you have children besides the tiny baby?

A. I have eleven living. I have twelve, one is dead.

Mr. Funk: That's all.

Signature waived.

Also the deposition of Elmer Sanders, Plaintiff in the last captioned suit herein, who being first duly sworn, deposed as follows:

Direct Examination by Mr. Rodes K. Myers.

Q. 1. You are Mr. Elmer Sanders?

A. Yes, sir.

Q. 2. Where do you live, Mr. Sanders?

A. Louisville.

Q. 3. What relation were you, if any, to Mrs. Minnie Henderson?

A. She was my aunt on my mother's side.

Q. 4. Other than Mr. John Henderson, her husband, is your mother her nearest blood relative at the time of Mrs. Henderson's death?

A. I reckon so. I wouldn't say positive.

Q. 5. What relation were you to Mrs. Henderson?

A. She was my aunt.

Q. 6. I believe your mother was her half sister?

A. That's right.

Q. 7. Now, then, after your aunt's death, I believe you were sued by Mr. John Henderson?

A. Yes. That's the first time I knowed anything about it.

Q. 8. Then, for the first time, did you discover you were the owner of some bonds?

A. Yes.

Mr. Funk: Objection, because that calls for a conclusion of Mr. Sanders.

Mr. Myers: I will prove that by subsequent questions.

Q. 9. Those were bonds listed in the petition filed by Mr. Henderson?

A. Yes.

Reporter's note: The following is a list of the bonds and their amounts, subject to check.

$1,000.00 dated May 1951, M 24389089 E
$1,000.00 dated May 1951, M 90 E
$1,000.00 dated May 1951, M 91 E

Q. 10. That was the first information you had that she had made any bonds payable to herself or you?

A. Yes. That's the first time I knew there was any bonds.

Q. 11. You are the Elmer Sanders named in those bonds?

A. Yes.

Cross-examination by Mr. Marshall Funk.

Q. 1. I believe your mother was a half sister to Mrs. Henderson, was she not?

A. That's right.

Q. 2. She was your aunt then by half blood, not full?

A. Yes.

Q. 3. So far as you know you and your sister—your mother is still living, isn't she?

A. Yes, mother is still living.

Q. 4. Then Mrs. Henderson's nearest kin is your mother?

A. Yes, as far as I know.

Q. 5. And not you and your sister?

A. I haven't said she was.

Q. 6. I am asking you.

A. I haven't said.

Q. 7. What did you say?

A. I said my mother, as far as I know.

Q. 8. Do you know whether any bonds were found bearing your mother's name?

A. No, I do not. I wasn't present.

Q. 9. You haven't heard of any?

A. I haven't heard of any, no.

Q. 10. What kind of work do you do?

Deposition of Elmer Sanders

A. I am general foreman at Charleston, Indiana, millwright.

Q. 11. What mill?

A. Millwright. Do you know what a millwright is?

Mr. Funk: No.

Witness: The men that set up the machinery.

Q. 12. Who do you work for?

A. The Blow Knocks Construction Company.

Q. 13. At Charleston, Indiana?

A. That's right.

Q. 14. You are general foreman over the millwright section?

A. Two hundred. I am in charge of all the millwrights in the 200 finish stage of Blow Knocks Construction Company.

Mr. Funk: That's all.

Signature waived.

OPINION OF THE COURT.

On September 27, 1952, three suits were filed in this Court by Helen Witchell, Elmer Sanders and Irvin B. Bewley, numbered as set out above. The petitions were substantially alike and together involved the ownership of twenty $1,000.000 Series E, United States bonds, none of which are yet due; two of these $1,000.00 bonds are claimed by Helen Witchell, three by Elmer Sanders and fifteen by Irvin Bradley Bewley. The pleadings are substantially the same and by an agreed order all three case were submitted February 11, 1953 and evidently consolidated or at least to be heard and tried together as the same evidence was taken for all.

Amended Petitions were filed in all three cases to bring them under the Declaratory Judgment Act, Sec. 639a sub-Sec. 1-12 of the Civil Code. The above-mentioned bonds were issued in the name of a decedent, Minnie Henderson *or* the three Plaintiffs, respectively. She will be hereinafter referred to as Minnie and her husband as John.

Minnie having died on May 3, 1952 and her husband, John having been appointed and qualified as the Administrator of her estate, the above-mentioned suits were brought against him individually and as such Administrator to recover the bonds, alleging that under rules of the Treasury Department of the United States, under which they were issued, the alternate surviving payee is the sole and exclusive proprietor of the bonds.

The Defendants' Answers as amended admit possession of the bonds and that they are listed in the alternative as set out in the petitions (and thereafter described by stipulation in the deposition) but that they are his sole and exclusive property because:

1. All the purchase money paid for these bonds was his sole and exclusive property and by a common understanding with his wife, Minnie, kept in a lock box in the American National Bank, to which she had access and the

key, and that she, without his knowledge and consent, converted such cash or funds into these bonds; and

2. That this was done fraudulently so as to make her appear as a coowner of such bonds; and

3. That it was done while she was of unsound mind and under duress and the coercion of the Plaintiffs, respectively.

Defendant, John, claims a constructive trust in his favor in the bonds and their proceeds, and he seeks appropriate orders establishing his rights and such as will effectively bring about a transfer of such bonds to him or the recovery of their proceeds.

This Court accepts the proceedings in these cases as under the Declaratory Judgment Act, as the parties, themselves, appear to have done so.

General and Special Demurrers are filed but the Court overrules all of them with exceptions and passes these cases to their merits.

Before discussing the evidence we note that no written exceptions have been filed to any of the depositions, although in the course of their being taken, frequent objections were made to the testimony of John, himself, some of which concerned transactions with his deceased wife, and to testimony of other witnesses as being hearsay, or as to evidence of statements of the decedent, herself, in her own favor. I must regard all of these objections as waived under Civil Code Sections 586 and 587, and as held in the case of *Stambaugh* v. *Belcher's Administrator,* 183 S. W. 2d 525, and many other cases therewith cited. However, even though written exceptions had been properly filed, I may say that the Court would have arrived at the same conclusions herein set out.

The facts are substantially as follows:

John and Minnie were married in 1896. For over thirty years prior to the death of Minnie they pursued an established policy of buying and selling real estate and investing in notes and mortgages, sharing equally therein. They

bought and sold numerous parcels of real estate consisting generally of small houses and lots, probably none of them exceeding $5,000.00 in value. All deeds were taken to John and Minnie, jointly with a survivorship clause. John having survived Minnie, who died on May 3, 1952, we find that he is now the owner by virtue of such survivorship clause of three or four houses and lots in Bowling Green, Kentucky.

John was a common laborer, a plodder, working for the Railroad Company at times for $100.00 per month. He was a little slow and never got beyond the second grade at school and we find that he committed the entire management of his business affairs or the business affairs of the family (himself and wife as they had no children) to Minnie. Minnie was smarter than John, with some business sense and experience and was an economizer and saver. The earings made on real estate transactions, together with rents and John's wages, were all given to Minnie, who invested them, sometimes in buying houses and lots, with John's approval, and at other times invested them in notes and mortgages recommended by her banker. (See the testimony of Jones Mercer).

All surplus money Minnie deposited in the American National Bank to the credit of John Henderson *and* Minnie Henderson and this account was so carried from 1936 to 1949 before any changes occurred. In addition, Minnie rented a lock box in the American National Bank, the key to which she, herself, kept, where she carried personal assets given to her as above set out or invested by her, in the same name as the checking account above referred to, to-wit: John Henderson and Minnie Henderson. In the lock box she presumably carried securities or cash or both, though no direct evidence of what or how much the box contained at any given time is offered. On the ledger sheet where deposits are shown, appear, in pencil, the names of persons who probably made payments on notes or mortgages and Jones Mercer says she advised with him

about investing in such securities. The ledger sheets indicate, from 1944 on, many deposits of over $1,000.00 and many checks of sums over $1,000.00, but there is no effort to explain any of these larger deposits or drafts. I note, however, that on October 5, 1949 there was a deposit of $6,135.84 and that the bank balance rose on November 19, 1949 (when the first bonds were purchased as hereinafter shown) to $12,198.70. On this date, November 19, 1949, twenty United States Series E bonds, $1,000.00 each, were purchased for the net sum of $15,000.00. At this time there were no drafts against this account to equal the purchase money for these bonds, although on November 21, 1949 there is an unexplained draft of $3,250.00 and on November 28, 1949 an unexplained draft of $3,750.00, aggregating $7,000.00. If these drafts were utilized in payment of the bonds purchased, where did the remaining $8,000.00 come from?

In November, 1949, Minnie bought, through the American National Bank, twenty United States $1,000.00 bonds, Series E, ten of them payable to Minnie Y. Henderson *or* John I. Henderson, and ten others payable to Minnie Y. Henderson alone. These twenty bonds, as thus purchased in November 1949, are set out on page 14 of the testimony of Velma B. Thompson. A careful inspection of the whole record in these cases will show that John was the worker and that his wages, together with rents from real estate and *ay* profits from the sale of real estate, were all turned over to Minnie, who was the business agent and manager for the family, and that Minnie was the manager, the economizer and the investor for these earnings or savings and I must conclude that much of the amount so accumulated is due to her. There is a basic moral consideration for a faithful spouse, who has economized and saved and managed, to share in the results of the common labors of the husband and the wife. The conclusion has been reached that between this husband and wife there was a common understanding that they should

share equally in all of these accumulated savings. There was an effective common ownership, although sole possession and management was placed in the hands of the wife. This is shown by the fact that she kept the account in the bank in the name of John Henderson and Minnie Henderson, for a long number of years and the lock box to which she held the key in the same names. It is shown that she, herself, never worked for wages, but the management, investment and handling of the common funds was solely with her. John never paid any attention to how she handled or disposed of these common funds. But he knew about the account in bank and in all probability the lock box as well. I read Questions 106 and 121 of his deposition:

Q. 107. "I believe you said that the money that was put in the bank was put in in both of your names?
A. That's right.
Q. 121. You and she had a joint bank account in the American National Bank and at at the time of her death that amounted to $5,689.06?
A. That's right."

Also I read Question 146:

Q. 146. "Go right ahead, Mr. John.
A. There wasn't any money up there in the bank and then I asked her about it and she—I thought there was fifteen or twenty thousand dollars *in that box cause she said it was* and when they opened it they didn't find any in it, and that's about all you want to know, isn't it?
Q. 149. Why did you expect that, Mr. John?
A. I understood she had it in the bank box.
Q. 150. Whose money was that you expected was in the box?
A. Mine, my money, I made it.
Q. 151. When you opened the box it wasn't there?
A. Nothing there, only bonds."

So John knew both about the account and the lock box.

Opinion—Warren Circuit Court

The legal effect of depositing money in a joint account in the names of the husband *and* the wife is to evidence a common and equal interest therein.

In the case of *Gellert* v. *Buzman's Admr.*, 39 S. W. 2, 511-512 it was written:

> "At the time of her death the savings account belonged to Mrs. Buzman and her husband. There being no contract of survivorship, one half of it belonged to her estate and one-half of it to Mr. Buzman. On her death he was entitled to his half and one-half of her one-half after the payment of her debts."

In the case of *Bishop* v. *Bishop's Executrix*, 170 S. W. 2d, pages 1-3, there was a joint account in the name of husband and wife with the notation however, "To either one or the survivor." The Court held that it was sufficient evidence of a contract between Mr. and Mrs. Bishop that the survivor should take the whole account. The Court based its ruling upon the theory of contract. This case differs from the one before us in that there is no notation upon the bank account or in the lock box of any matter of survivorship. Nor was there any understanding with any banker that there was any contract of survivorship. But there is strong evidence of a common equal ownership. The way the deeds were taken is at least a guiding light for us and on the part of Minnie there is a recognition of John's equal ownership, in that for so many years she carried the account as John Henderson and Minnie Henderson and the lock box likewise until the year 1949. In November of that year she bought the United States bonds. Here again she recognized a joint and equal ownership because she caused to be issued ten of the bonds in the name of John Henderson *or* Minnie Henderson and the ten remaining bonds in her name alone. This, I say, was evidence of a joint proprietorship for here she is purchasing twenty bonds and dividing them equally between herself and her husband. It is true the first ten bonds are made

payable to John Henderson or Minnie Henderson. This was necessary if she was to continue to act as the business agent of the family partnership funds and so that she could, if necessary, cash such bonds or cause them to be reissued under the regulations of the Treasury Department of the United States. I look upon this division or partition as a definite recognition on Minnie's part that John owned one-half of the proceeds invested in these bonds. It is true that Minnie made the division without consulting John, so far as we know, but where such a partition is made and it is fair and equal, a Court of Equity should not interfere. It might be said that whether these funds with which the purchase of the bonds was made, came out of the lock box, is conjectural and speculative; but I have reached the conclusion that all personal assets, consisting of bank funds or securites, were the product of the common efforts of husband and wife and subject to their understanding of a common ownership and that there were no other funds in existence other than these with which she might have purchased these bonds. The claim of John that all these bonds belonged to him because his wages entered into them, cannot be supported. But it may be thought that when all the real estate was taken in the names of husband and wife jointly, with a survivorship clause, the same survivorship clause by implication should be projected into the bank account and lock box. No such conclusion can be reached when we consider the absence of any suggestion whatever of a survivorship contract on the ledger sheets of the bank account or with any conversation with the banker or in any memorandum of the lock box. So that I conclude that John and Minnie had an equal ownership of all these funds, whether in the lock box or in the bank account and that there were none other from which the purchase of the bonds could be made.

There are three steps in Minnie's handling of these bonds. The first is their purchase and equal division in November 1949. The second is the unlawful conversion of

John's bonds on May 15, 1951 and the third is the gift of Minnie's bonds by her to Irvin Bradley Bewley as of September 25, 1951. Now I proceed to the unlawful conversion of the ten bonds of John on May 15, 1951. At that time, as is shown on page 15 of the deposition of Velma B. Thompson, she caused John's ten bonds to be re-issued—two of them to Minnie Henderson or Helen Witchell; three of them to Minnie Henderson or Elmer Sanders, and five of them to Minnie Henderson or Irvin B. Bewley. These ten bonds were dated May 1, 1951 and they are the bonds claimed by Witchell, Sanders and Bewley in this case. As this was a co-partnership, and particularly as the relation of husband and wife existed, there was such a confi*n*ential relationship as imposed good faith and a trust upon Minnie, who had the sole possession of these funds, to deal fairly with her husband. To prevent any wrongdoing, the Court will impose a trust upon these funds and bonds to prevent any fraud being committed against John, the real owner thereof. The right of the Court of Equity to impose such a trust and to pursue the funds into the hands of third persons who do not occupy the position of bona fide purchasers for value, is well established. In the case of *McCracken County* v. *Lakeview Country Club*, 70 S. W. 2d 939-942, the Court quotes with approval from Third Pomeroy Equity Jurisprudence (4th Edition) as follows:

> "A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. If one person having money or any kind of property belonging to another in his hands, wrongfully use it for the purchase of lands, taking the title in his own name; or as an agent of bailee wrongfully *id*poses of his principal securities and with the proceeds purchases other securities in his own name, in these and all similar cases Equity impresses a constructive trust on the new form or species of property, not only while it is in the hands of the original wrong-doer, but as long as it can be

followed and identified in whosesoever hands it may come, except in those of a bona fide purchaser for value and without notice."

As to these particular ten bonds, the plaintiffs in these three suits cannot claim to be bona fide purchasers for value, for they paid nothing for these bonds and indeed never knew about them until after the death of Minnie. They can, therefore, only stand in the shoes of Minnie, herself.

As the original purchase money is gone and we have only the bonds before us, these ten bonds must be declared to be the property of John, and the Court will make any proper orders to secure him in his proprietorship.

Now, I proceed to the third step, which was on September 25, 1951, whereby Minnie caused her own bonds, as divided in November 1949, to be re-issued and placed in the name of Irvin B. Bewley, as a payee. These bonds are identified in the deposition of Mrs. Thompson and in the stipulation of counsel in the record. The Court has reached the conclusion that in September, 1951 Minnie made a gift of her own ten bonds to Irvin Bradley Bewley, which can be supported, as a gift causa mortis. We must recall that at this time Minnie was afflicted with a cancer from which, about eight months later, she died. She had two operations at Louisville, Kentucky and in the judgment of the Court her maneuvering and shifting of these bank accounts and lock boxes is evidence of the fact of her recognition of her own inevitable death from the disease from which she then suffered. Her purpose in such shifting and maneuvering of bank accounts and lock boxes is plain and it was to conceal from John what she was doing. Her motive may be good or may be bad. Her motive may have been partly to protect John, for there is enough in this record to show that John needs protection. She may have thought that after her death he would be the prey of some designing person, either male or female and these were

her own bonds, set apart, it is true, to her own name by her own voluntary act, but as it was done fairly and equally, this Court will not interfere with it. As these bonds were issued in the name of Minnie Henderson *or* Irvin B. Bewley and as she continued in possession and control of them, that transaction of September 25, 1951 cannot be maintained as a gift inter-vivos, but I think it can be properly maintained and supported as a gift causa mortis.

In the case of *Adcock* v. *Bishop*, 218 S. W. 2, 52, the Court said that a gift causa mortis is:

> "One made in expectation of the donor's death upon condition the donor dies as anticipated without having revoked it. The donor must contemplate death from some present illness or impending peril. The donor may not be in extremis but the prospect of a surgical operation may give rise to the necessary apprehension of impending dissolution."

We also cite the case of *Dickerson* v. *Snyder*, 272 S. W. 384-385. The gift of these bonds was effective by causing them to be made payable to Minnie Henderson or Irvin B. Bewley. The gift was not irrevocable, as in the case of a gift inter-vivos, but was intended to take effect at the death of the donor, unless, in the meantime, she revoked it. It may be said, however, that actual possession of these bonds never passed to Bewley. In the judgment of the Court there was a constructive transfer of their possession and that Minnie merely held these bonds after September 25, 1951 as Trustee for Bewley. This was in part due to the peculiar nature of E bonds, which are not transferrable by delivery, but which may be cashed or caused to be re-issued by either one or the other of the payees. I regard the intention of the mother in this case as plain and that was to make a permanent gift to Bewley of these ten bonds, which in the meantime she would hold in her actual possession as agent or trustee for him. This boy, Irvin Bradley Bewley, had been taken in infancy by John

and Minnie and reared by them in their home until he was eighteen years of age. They had no children of their own and they no doubt looked upon him as their child. Thus every natural instinct of affection would call upon the mother's heart to take care of this boy.

So, the ruling of the Court is that Irvin Bradley Bewley is the owner of these ten bonds which are identified and set out in the deposition of Mrs. Thompson. The question whether United States bonds like those before us were the subject of a gift inver vivos came up in the case of *Moore's Administrator* v. *Marshall,* 196 S. W. 2d 369, and it was held that they were not the subject of gift inter vivos, though the opinion, I think plainly implies they might be the subject of a gift causa mortis. In any event these bonds were the property of Minnie and by contract between her and the United States, they were payable to the Plaintiff, Bradley Bewley, after her death, according to the terms of the bonds. See Warren v. United States, 74 L. Ed. 1154. However, there are five bonds of date May 1, 1951, which he is claiming but is not entitled to. No one but he, himself, can cash these five bonds which belong to John or cause them to be re-issued. He that comes into a Court of Equity must do equity. I hold that the ten bonds which Minnie gave him before her death shall not be delivered to him until he accounts for the five bonds which are now in his name, but to which he is not rightfully entitled as they belong to John. As to the other five bonds in the names of Helen Witchell and Elmer Sanders, difficulties may be encountered in their transfer or collection. These E bonds cannot be transferred and they can be collected only by these two payees. That problem, however, is not before this Court now for immediate solution and the Court is declaring that Bewley is the owner of the ten bonds given to him by his mother, while John is the owner of the other ten attempted to be given to Helen Witchell, Elmer Sanders and Irvin B. Bewley.

Other than the bonds above referred to, the entire personal assets in bank or elsewhere must be declared to be the joint and equal property of John and Minnie, one-half going to John and the other half going to the Administrator of Minnie's estate.

Let judgment be drawn in conformity to this opinion, which shall be filed as a part of the record for purposes of appeal.

The costs of the case should be equally shared by Bewley and John Henderson.

(s) Jno. B. Rodes,
Judge, Warren Circuit Court.

COURT OF APPEALS OF KENTUCKY
File No. V-13-53

Minnie Henderson's Admr.
(John Henderson), Indv., - - - - Appellant,

v. Appeal from Warren Circuit Court,
Hon. John B. Rodes, Judge.

Irvin B. Bewley, - - - - - - - Appellee.

Helen Witchell, - - - - - - - - Appellant,

v. Appeal from Warren Circuit Court,
Hon. John B. Rodes, Judge.

Minnie Henderson's Admr.
(John Henderson), Indv., - - - - - Appellee.

Elmer Sanders, - - - - - - - - Appellant,

v. Appeal from Warren Circuit Court,
Hon. John B. Rodes, Judge.

Minnie Henderson's Admr.
(John Henderson), Indv., - - - - - Appellee.

PETITION FOR REHEARING.

May it please the Court:

On December 18, 1953, without any apparent dissent, this Court denied the claims of Irvin B. Bewley, Helen Witchell and Elmer Sanders against the estate of Minnie Henderson. The opinion of the Court is made a part of this Petition for Rehearing and is indicated as "Appendix B" and is for the convenience of this Court in considering the matters that we desire to point out.

Petition for Rehearing

In the original opinion at the bottom of page 4, the question is very plainly presented and we agree that it is a most important question that was presented for consideration in the entire litigation. This question is answered in the affirmative when the Court says:

> "Since the money that went into the purchase of the bonds came from the joint efforts of John and Minnie Henderson, Minnie would have been legally entitled to give her half to whomever she desired."

There is no necessity to reiterate the evidence or refer back to the transcript for the reason that all such matters are correctly settled in the majority opinion. In considering this Petition for Rehearing, we know that the Court will bear in mind that this small estate came about through the joint efforts of Minnie Henderson and her husband; that this Court stated in its opinion that Minnie could give to whomever she pleased, her share, which would be $10,000.00 and without any question of doubt, she amply indicated her desire and intention where she wanted her one-half or $10,000.00 to go.

QUESTIONS OF LAW.

a. There was constructive delivery of the bonds in question to Irvin B. Bewley.

At the time of the purchase of the 10 bonds in question by Minnie Henderson, she revealed her intention of whom she wanted her share of the estate to go by inserting in the application for the bonds and later included in the face of the bonds the alternate beneficiary, Irvin B. Bewley, who then and there and at that time had as much right to cash the bonds as did Minnie Henderson. We respectfully submit for consideration by this Court the fact that this Court has held that a donor can be trustee for the donee. In 1891, Judge Bennett wrote in the opinion of Williamson v. Yager, et al., — Ky. —, 15 S. W. 660, that the

rule upon this subject as set forth in 8 American & English Encyclopedia Law, Page 323, seems to be that title to personal property may be transferred without delivery of possession and without consideration by a declaration of trust. The title to personal property can ordinarily only be transferred by way of gift, by a delivery of the property, actually or constructively, to the donee, or to some person in trust for him; also the donor may constitute himself a trustee for the donee, but, in order to do this, it is necessary for the donor to clearly and unequivocally declare that he henceforth holds the property as trustee for the donee. This declaration may be done by so many words or by acts amounting to the same thing. When this trust is clearly created by the donor, equity will uphold it and treat the gift as executed. If one delivers possession of personal property to a trustee to hold as gift for the donee, it is certainly a valid gift and if he expressly says or does acts amounting to the same thing, he constitutes himself a trustee to hold the property for the donee and we quote from the opinion:

> "We perceive no reason why this should not be as valid and binding as a delivery of the property to a third person to be held in trust for the donee; the only difference being that in the first-named case the trust, by clear and explicit language, or acts amounting to the same thing, should be perfectly created, in order to prevent the confounding of the trust with an imperfect gift. Therefore, in seeking to enforce the trust, the donee must show that the donor has left nothing undone that is necessary to create it, and if it appears that the donor has yet to make a conveyance to the donee, the trust will not be enforced, because not perfectly created. So it would be in case of a third person as trustee. But if nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the prop-

erty was not changed. This is upon the broad principle that in such matters a party may make himself trustee, as well as a third person. This court is in line with the foregoing views. In Barkley v. Lane, 6 Bush, 589, it is said: 'Nor was it essential to the validity of the trust that a trustee be formally appointed, as the owner of the property may convert himself into a trustee, and hold it for the benefit of another, without transmitting the possession.' In that case there was a gift without delivery of possession, or without consideration; but the owner had clearly and explicitly made himself trustee. Also to the same effect is Barton v. Barton, 80 Ky. 215."

Since the question of delivery seems to have been uppermost in the mind of this Court, we would like to refer to the text material in 4 Pomeroy's Equity Jurisprudence, 397-401, which is a portion of Section 1149. We will not make ourselves ridiculous by trying to improve on this great writer's comment and we therefore quote his comments which we believe have some bearing on the question of delivery and possibly may be of some benefit to the Court in considering this Petition for Rehearing:

"*Constructive Delivery*—Delivery may be actual—a manual possession of the article itself by the donee or his agent—or constructive. If constructive, it must be more than any mere words, and more than any mere symbolic act. A constructive delivery must be something which completely terminates the donor's custody and control of the article donated, and which places it wholly under the donee's power, and enables him without further act on the donor's part to reduce it to his own manual possession. All the cases which hold a constructive delivery to be good, whatever be their special circumstances, will be found to conform to this criterion: that the donor parts with all control and power of exercising dominion, while the donee obtains the exclusive power of taking physical possession and custody of the article, so that it is in fact

placed under his sole dominion. (Constructive delivery is, however, sufficient when actual, manual delivery is either impracticable or inconvenient. The contents of a warehouse, trunk, box, or other depository may be sufficiently transferred by delivery of the key of the receptacle. Thus delivery of a saving deposit may be by delivery of the key of the box containing the bank book.) At all events there should be the clearest evidence of the donor's intention to make the gift, and something more than the *mere* delivery of the key. Unless the donor completely divests himself of all power over the article, if he retains in *any* manner *any* custody over it, or exercise any acts of dominion over it, the delivery of a key will not be a sufficient delivery to perfect the gift.

"*(Writing as substitute for manual delivery*—Where the subject-matter of the gift can be manually delivered it is ordinarily held that a writing is ineffective without a delivery of the property, at least where the writing is not a deed or instrument under seal. And in some cases it has been held that such gifts cannot be effected even by formal instruments of conveyance or assignments.

"*(Savings deposits*—The courts are generally in accord with the rule that there is sufficient delivery of a savings deposit by delivery to another of the savings bank pass book, possession of which controls the deposit, with the intention of making a gift of the deposit evidenced by the pass book. But it is to be noted that a general deposit in a bank does not pass by delivery of the pass book showing the deposit.)

"*Acceptance*—As a delivery is necessary, it follows, as a further requisite to a valid donation, that the donee must accept it. Such acceptance, however, will be presumed when the gift is for his advantage, in the absence of all contrary evidence."

This subject has been efficiently annotated in 3 A. L. R. 926; 60 A. L. R. 1059 and source material in 24 Am. Jur. 752.

b. The Lower Court could see no fraud in this case.

Honorable John B. Rodes, Judge, Eighth Judicial District, in addition to his extraordinary range of vision into the law, required counsel on both sides to present briefs and also the claims were argued orally before him. This record was perused thoroughly by him. In order to show to this Court the conscientious attention given to the record by the Chancellor, we are attaching to this Petition for Rehearing his 12-page opinion and it is designated as "Appendix A." Nowhere in this opinion of the Chancellor does he remark one way or the other as to fraud being an element in these claims. A reference to the original transcript shows that John Henderson knew on several occasions what was going on with regard to bank accounts and lock boxes. For example, at Volume III, Tr. Ev. P. 5, Q. 36, old man Henderson admits that he did some of the banking. Same volume, P. 7, Q. 51, he admits that he knew about the bond transaction prior to the death of Minnie. Same volume, P. 14, Q. 109, he admits that he knew what was in the lock box prior to her death.

CONCLUSION.

It is our earnest and sincere desire and we believe that we express the opinion of all parties concerned, including the Chancellor, that there should be some clarification of the original opinion, especially with respect to the matters of fraud involved, for if there was any fraud at all, it is bound to apply to all of the bonds in question and, therefore, the constructive trust which arises in favor of a defrauded person means that John Henderson is entitled to the entire amount. We do not believe this Court intended that only a portion of the bonds were defrauded and if so, what portion. It is quite evident that the reasoning of the Court was that the $20,000 was to be divided half and half, that is, one-half to John Henderson and the other half to

Minnie Henderson with the right in Minnie to dispose of her half as she pleased and which she did not do according to the original opinion simply because there was no delivery and with which we quite earnestly disagree. Therefore, what happens to Minnie Henderson's $10,000.00? John Henderson gets one-half of $10,000.00 by reason of being her husband and the other $5,000.00 goes to her natural successors. These among other questions should be answered and the original opinion clarified.

Respectfully submitted,

Myers & Logan,
By Rodes K. Myers,
Counsel for Irvin B. Bewley, Helen Witchell and Elmer Sanders,
Myers Building,
Bowling Green, Kentucky.

COURT OF APPEALS OF KENTUCKY

DECEMBER 18, 1953.

MINNIE HENDERSON'S ADMINISTRATOR (JOHN HENDERSON), AND JOHN HENDERSON INDIVIDUALLY, - - - - *Appellant*

v.

IRVIN B. BEWLEY, - - - - - - - - *Appellee*

AND

HELEN WITCHELL, - - - - - - - - *Appellant*

v.

MINNIE HENDERSON'S ADMINISTRATOR (JOHN HENDERSON), AND JOHN HENDERSON, INDIVIDUALLY, - - - - - *Appellee*

AND

ELMER SANDERS, - - - - - - - - - *Appellant*

v.

MINNIE HENDERSON'S ADMINISTRATOR (JOHN HENDERSON), AND JOHN HENDERSON, INDIVIDUALLY, - - - - - *Appellee*

CONSOLIDATED CASES.

Appeal from Warren Circuit Court,
John B. Rodes, Judge.

OPINION OF THE COURT BY JUDGE CAMMACK—AFFIRMING IN PART AND REVERSING IN PART ON APPEAL, AND AFFIRMING ON CROSS APPEAL.

These three consolidated actions involve the ownership of twenty $1,000 United States Savings Bonds, Series E

John Henderson is the administrator of the estate of his deceased wife, Minnie Henderson, who died intestate in May, 1952. He claims all of the bonds. Irvin Bewley claims fifteen of them; Helen Witchell claims two; and Elmer Sanders claims three. The appeals challenge the correctness of the chancellor's ruling that John Henderson owns ten of the bonds and Irvin Bewley ten of them.

John Henderson and Minnie Mae Young were married in 1892. Minnie had no property or money, nor did she receive any during marriage except that given to her by John. John conveyed a one-half interest in his property to Minnie, with a survivorship agreement, and turned his pay check over to her each payday. Minnie had complete control over all the finances during her life.

Minnie was an astute businesswoman. John had only a second grade education and manifested little, if any, business acumen. Minnie started dealing in real estate with the approval of John, who assisted in reconditioning the property. The profits she realized from these transactions were deposited in the couple's joint bank account. By 1947 they had in their joint bank account and private lock box approximately $20,000. The record does not show whether this money was the savings from John's 60 years of labor—40 years as a machinist with the railroad and 20 years with various local employers as a common laborer—or a combination of his labor and the profits from the property transactions of Minnie. John claims that this was his money that he turned over to Minnie, who did all the banking.

From the savings, Minnie bought the twenty $1,000 bonds in dispute. Ten of these were put in the name of Minnie Y. Henderson or John I Henderson and the remaining ten were put in Minnie's name only.

On May 5, 1951, Minnie cashed the ten bonds registered in her and John's names. She purchased with this money two $1,000 bonds and had them issued to Mrs. Minnie Y.

Henderson or Mrs. Helen Witchell. She purchased three other $1,000 bonds in the name of Mrs. Minnie Y. Henderson or Elmer Sanders. She purchased five $1,000 bonds and had them issued to Mrs. Minnie Y. Henderson or Irvin B. Bewley. On September 21, 1951, Minnie cashed the remaining ten $1,000 bonds which were in her name only, and purchased new bonds and had them issued to Mrs. Minnie Y. Henderson or Irvin B. Bewley.

All of the purchasing and selling of bonds was done by Minnie without the approval or knowledge of John, or any of the other parties to this suit. There is some evidence that John overheard her say two weeks before she died that she had purchased bonds with their money. The reason he gave for not saying anything at the time was that he did not want to disturb her because she had been suffering from cancer for two years and had to take narcotics to allay the pain. There is testimony to the effect that she was mentally deranged at times during these two years of sickness, because of pain, narcotics and age. During these years she expressed the belief that John was running around with other women and she was afraid he would squander their savings.

It is well to note Minnie's unusual behavior concerning her lock boxes. The record shows that Minnie rented a number of lock boxes. Upon surrendering one, she would rent another, at times in her maiden name, and at others in the name of her mother, but always for the sole benefit of Minnie, with instructions not to give out information or mail anything that would indicate her ownership of a box.

Upon being appointed administrator of Minnie's estate, John opened the lock box and found the twenty bonds in dispute instead of the cash which he expected. He refused to surrender these bonds to the named payees, and as a result this litigation followed. Helen Witchell and Elmer Sanders, two of the plaintiffs, are daughter and son of Minnie Henderson's half sister. Irvin B. Bewley, the other

plaintiff, is a son of a niece of John Henderson, whom the Hendersons took into their home shortly after birth and raised, but never legally adopted him.

The lower court declared a constructive trust in favor of John Henderson of the ten bonds that were originally in John or Minnie Henderson's name. This included the two bonds in Helen Witchell's name, the three bonds in Elmer Sanders' name and the five bonds in Irvin B. Bewley's name. The remaining ten bonds were given to Irvin B. Bewley. However, they were to remain in the possession of John, the administrator, until Irvin Bewley accounts to John for five of the bonds which are in his name, but to which he is not rightfully entitled, because the court declared them to be the property of John. All of the bonds are in John's possession, but because of the contract with the United States Treasury Department, only the payee can receive payment.

The general proposition that a constructive trust can be declared in favor of one who has been defrauded is recognized in McCracken County v. Lakeview Country Club, 254 Ky. 515, 70 S. W. 2d 938. The question for our determination is, Can a constructive trust be declared in United States Savings Bonds, Series E, in favor of a defrauded person? The question is answered in the affirmative in the cases of Katz v. Driscoll (1948), 36 Cal. App. 2d 313, 194 P. 2d 822; and Ibey v. Ibey (1945), 93 N. H. 434, 43 A. 2d 157.

When Minnie took the money from their joint lock box without John's knowledge, she practiced a fraud upon him; therefore, a constructive trust should be imposed, in has favor, upon the ten bonds; two of which were in Minnie's or Helen Witchell's name; three in Minnie's or Elmer Sanders' name; and five in Minnie's or Irvin Bewley's name.

Since the money that went into the purchase of the bonds came from the joint efforts of John and Minnie

Henderson, Minnie would have been legally entitled to give her half to whomever she desired. The question now arises, Could she, or did she, legally give her share to Irvin Bewley? In the case of Moore's Adm'r v. Marshall, 302 Ky. 729, 196 S. W. 2d 369, the question was discussed, and it was decided that United States bonds can not be the subject of an inter vivos gift. There is some authority that United States bonds can be transferred by gift causa mortis. Dietzen v. American Trust & Banking Co., 175 Tenn. 49, 131 S. W. 2d 69. But in the case at bar the essential element of delivery, either actual or constructive, is absent. 24 Am. Jur., Gifts, sections 26, 27 and 28.

As Minnie failed in her attempt to give away her one-half interest in the bonds, it follows therefore that they will pass by intestate succession, five going to John and five going to her lawful heirs. KRS 392.020. The Chancellor should enter an order directing the named payees to sign the bonds.

On the appeal of John Henderson, the judgment is reversed, to the extent that he is entitled to fifteen of the bonds, with directions that a judgment be entered consistent with this opinion. On the appeals of the other parties, the judgment is affirmed.

Attorney for Appellant John Henderson:

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Bowling Green, Ky.

Attorneys for Cross Appellee Irvin B. Bewley and Appellant Helen Witchell and Appellant Elmer Sanders:

MYERS & LOGAN,
RODES K. MYERS,
Bowling Green, Ky.

Opinion—Court of Appeals of Kentucky

ORDERS—KENTUCKY COURT OF APPEALS
Winter Term—March 5, 1954

Henderson's Admr.	vs.	Bewley	Warren
Witchell	vs.	Henderson's Admr.	Warren
Sanders	vs.	Henderson's Admr.	Warren

The Court being sufficiently advised, the petition of appellants for a rehearing be and the same is hereby overruled.

(s) Brady M. Stewart,
Acting Chief Justice.

A copy Attest:
Acree Austin, Clerk,
Court of Appeals, Kentucky.

No. 109

JAN 3 19

HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

IRVIN B. BEWLEY, Bowling Green, Ky.,
MRS. HELEN WITCHELL, Louisville, Ky.,
ELMER SANDERS, Louisville, Ky., ... *Petitioners,*

versus

JOHN HENDERSON, Bowling Green, Ky., ... *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Submitted by
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Counsel for Respondent

SUPREME COURT OF THE UNITED STATES

IRVIN B. BEWLEY, Bowling Green, Ky.,
MRS. HELEN WITCHELL, Louisville, Ky.,
ELMER SANDERS, Louisville, Ky., ... *Petitioners,*

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JOHN HENDERSON, Bowling Green, Ky., ... *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

IRVIN B. BEWLEY, Bowling Green, Ky.,
MRS. HELEN WITCHELL, Louisville, Ky.,
ELMER SANDERS, Louisville, Ky., ... *Petitioners,*

versus

JOHN HENDERSON, Bowling Green, Ky., ... *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(Opinion below reported 264 S. W. (2) 680

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

John and Minnie Mae Henderson, an old childless couple who were married in 1892, had accumulated in their joint bank account and p r i v a t e lock box approximately $20,000.00 by 1947. John claims that this was all his money that he turned over to Minnie, who did all the banking.

From the savings, without John's knowledge or consent, Minnie purchased twenty $1,000.00 Series E. Savings Bonds. She put fifteen of these bonds in her name with Irvin B.

Bewley as co-owner, three in her name with Elmer Sanders as co-owner, and two in her name with Helen Witchell as co-owner.

These purchases were made surreptitiously, in violation of her confidential relationship with John, and under such conditions as to constitute a fraud against him. There is testimony to the effect that she was mentally deranged at times during the period of time involved in the purchase of these bonds because of pain, narcotics, and age.

Minnie died intestate, and upon being appointed administrator of Minnie's estate, John opened the lock box and found the twenty bonds in dispute in this case instead of the cash he expected. He refused to surrender the bonds to Bewley, Sanders and Witchell and they instituted litigation in the Warren Circuit Court at Bowling Green, Kentucky to recover the bonds. The lower court awarded ten of the bonds to John under a constructive trust theory because of the fraud practiced on John by Minnie, and awarded ten of them to Bewley on a gift *causa mortis* theory based on the idea that Minnie helped John conserve the cash that went into the bonds, and that she, therefore, was entitled to half the bonds as a matter of equity and could do with them as she pleased.

The Court of Appeals of Kentucky, which is Kentucky's Court of last resort, ruled that when Minnie took the money from their joint lock box without John's knowledge, she practiced a fraud on him; therefore, the constructive trust should be imposed, in his favor, upon ten of the bonds; that the other ten bonds belonged to Minnie's Estate and, therefore, should be distributed under the laws of descent and distribution of Kentucky, five to John as the surviving spouse and the other five to Minnie's heirs at law. The lower court was reversed on its theory of a gift *causa mortis* for the reason that the es-

sential element of delivery was lacking, it appearing that Bewley did not even know of the existence of the bonds in his name.

The Court of Appeals of Kentucky ruled that the Chancellor should by contempt proceedings require Bewley, Sanders and Witchell to endorse the bonds so John could cash them and carry out the judgment of the court, it appearing that the Treasury Department of the United States has declined to cash the bonds unless endorsed by Bewley, Sanders and Witchell. (Pp. 64A-68A, Appendix to Petition for Writ of Certiorari filed April 9, 1954).

Bewley, Sanders and Witchell have filed a petition for a Writ of Certiorari in the Supreme Court of the United States seeking to invoke the jurisdiction of the Supreme Court of the United States on the theory that a Federal question of substance is involved in the case.

ARGUMENT

It is the Respondent's petition that this case does not involve a situation in which a state court has decided a Federal question of substance not theretofore determined by the United States Supreme Court, nor does this case present an instance in which the state court has decided the matter in a way probably not in accord with applicable decisions of the United States Supreme Court, nor are there any special and important reasons why the United States Supreme Court, in the exercise of its sound discretion, should issue a writ of certiorari in this case. (*Rules of United States Supreme Court*, Rule 38, Sections 5 and 5a), Rule 19 of 1954 issue).

Nor does this case involve a situation in which the validity of a statute of the United States is drawn in question, nor does it involve a situation in which any right, title, privilege or im-

munity is specially set up or claimed under the Constitution of the United States or under any of the treaties or statutes of or commission held or authority exercised under the United States. (Title 28, *U. S. C. A.* 1257, Sub Section 3.)

In spite of what may appear in the Petition for Writ of Certiorari submitted April 9, 1954, the REAL question involved herein is as set forth in the opinion of the Court of Appeals of Kentucky. This question is specified and defined as follows:

> "The general proposition that a constructive trust can be declared in favor of one who has been defrauded is recognized in McCracken County v. Lakeview Country Club, 254 Ky. 515, 70 S. W. 2d 938. The question for our determination is, CAN A CONSTRUCTIVE TRUST BE DECLARED IN UNITED STATES SAVINGS BONDS, SERIES E, IN FAVOR OF A DEFRAUDED PERSON? (Emphasis ours) The question is answered in the affirmative in the cases of Katz v. Driscoll (1948), 36 Cal. App. 2d 313, 194 P. 2d 822; and Ibey v. Ibey (1945), 93 N. H. 434, 43 A. 2d 157.
>
> "When Minnie took the money from their joint lock box without John's knowledge, SHE PRACTICED A FRAUD UPON HIM; THEREFORE, A CONSTRUCTIVE TRUST SHOULD BE IMPOSED, (emphasis ours) in his favor, upon the ten bonds; two of which were in Minnie's or Helen Witchell's name; three in Minnie's or Elmer Sanders' name; and five in Minnie's or Irvin Bewley's name." (P. 67A of Appendix to Petition for Writ of Certiorari submitted April 9, 1954.)

That the Treasury Department of the United States recognizes the propriety of a state court awarding United States Savings Bonds to the real owner, as distinguished from the registered owner thereof, is clear.

I respectfully refer the Court to Section 315.13, Subpart D, *United State Treasury Department Regulations, Governing United States Savings Bonds*, Department Circular 530, Seventh Revision, dated May 21, 1952, which is as follows:

"SEC. 315.13. JUDICIAL PROCEEDINGS (JUDGEMENT CREDITORS, TRUSTEES IN BANKRUPTCY, RECEIVERS OF INSOLVENTS' ESTATES AND CONFLICTING CLAIMANTS). A claim against an owner or co-owner of a savings bond conflicting claims as to ownership of or interest in such bond as between co-owners or the registered owner and a designated beneficiary, will be recognized when established by valid judicial proceedings and payment or reissue will be made, upon presentation and surrender of the bond, except as follows:

"(1) No proceedings will be recognized if they would give effect to an attempted voluntary transfer inter vivos of the bond or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving co-owner or beneficiary.

"(2) A judgment, creditor, a trustee in bankruptcy or a receiver of an insolvent's estate will have the right to payment (but not to reissue) and a judgment creditor will be limited to payment at the redemption value current thirty days after the termination of the judicial proceedings or current at the time the bond is received, whichever is smaller.

"(3) If a debtor, or bankrupt, or insolvent, is not the sole owner of the bond, payment will be made only to the extent of his interest therein, which must be determined by the court or otherwise validly established.

"A divorce decree ratifying or confirming a property agreement between husband and wife or otherwise setting their respective interests in savings bonds will be recognized and will not be regarded as a proceeding giving effect to an attempted voluntary transfer for the purpose of this section."

The following decisions are cited for the purpose of showing that there is no Federal question involved in this case and that the courts throughout the land have recognized that there is nothing in the Treasury Regulations that forbids the judi-

ciary, both State and Federal, to recognize and enforce the real ownership, of United States Savings Bonds, in proper cases, even though the real ownership may differ from the registered ownership.

1. *Dietzen v. American Trust & Banking Co.*, 131 S. W. 2d 69, 175 Tenn. 49. In this case the Tennessee Court recognizes the validity of a gift *causa mortis* of United States Savings Bonds where the validity of such gifts was established by judicial proceedings.

2. *In re Laundree's Estate*, 91 N. Y. S. 2d 482, 195 Misc. 754, Reversed on other grounds, 100 N. Y. S. 2d 145, 277 App. Div. 994. In this case the Court held that the Treasury Regulations to the effect that a surviving beneficiary of United States Savings Bonds would be recognized as the sole owner of the bonds, are not intended to prevent a legal representative from pursuing, in the interest of creditors, the proceeds of bonds fraudulently transferred to a beneficiary without consideration.

3. *In re Bartlett*, D. C. N. Y. (1947) 71 F. Supp. 514. The Court here held that where Series E. United States War Savings Bonds were purchased in the name of the bankrupt payable on his death to his mother, the beneficiary did not have an interest in the bonds, but the bankrupt was sole owner of the bonds, and he was properly directed to surrender the bonds to the bankruptcy trustee.

4. *Hausfelder v. Security-First Nat. Bank of Los Angeles*, 176 P. 2d 84, 77 Cal. App. 2d 478. Plaintiff who, with decedent, rented a safety deposit box as "joint tenant" with right of survivorship was not precluded from obtaining title to Government Savings Bonds deposited by decedent and payable to decedent on ground of Treasury Regulations prohibiting transfer, etc., where plaintiff's ownership was established by

a judicial proceeding and plaintiff's sole ownership was not acquired by "voluntary transfer *inter vivos*" prohibited by the regulations but only by virtue of the decedent's death.

It is respectfully submitted that by the express provisions of Sec. 315.13 of Subpart D, quoted above, the right of a state court to award the ownership of bonds to a person other than the registered owner is recognized.

The above quoted Sec. 315.13 says "...conflicting claims as to ownership...will be recognized when established by valid judicial proceedings..."

The language is plain. The intent is plain. "Valid Judicial Proceedings" shall govern as to ownership of bonds. No mere method of registration shall be allowed to defeat real ownership determined by our courts.

It is respectfully submitted that the above referred to Treasury Regulations themselves absolutely cut the ground from under the Petitioners.

To hold that a bureaucratic regulation may be used as a method to avoid civil liability arising from breach of trust or fraud or embezzlement and unjust enrichment would be an abomination.

It was for the purpose of avoiding just such an undesirable result that the court held in the case *Makinen v. George*, 19 Wash. 2d 340, 142 Pac. 2d 910 that there was no inconsistency between the Treasury Regulations specifying that the registered owner of a bond must be recognized as the owner and a judgment of the court designated the owner as one other than the one designated on the bond. The court properly held that the real owner, that is the one designated by the state court as the real owner, is in fact the owner and entitled to the proceeds of the bond.

To the same effect is *Williams v. Letton*, 228 Ky. 371, 15 S. W. 2d 296 and the other cases cited in *Moore's Admr. v. Marshall*, 196 S. W. 2d 369, 302 Ky. 729.

The court in Moore's Admr. v. Marshall, *supra*, held that under the facts in that case, Series E. Bonds were not the subject of a VOLUNTARY gift *inter vivos*. In that case the court held that six Series E Bonds issued in the name of H. C. Moore as registered owner were not transferable by gift *inter vivos* to Helen Marshall. The reason given for this holding was that the bonds were issued to H. C. Moore and registered in his name pursuant to a contract with the United States Government. By the terms of this contract as embodied in the bonds and pertinent Treasury Regulations the same were not transferable. The court said that this contract with regard to all its terms and conditions, including its non-transferability features was enforceable and that, therefore, H. C. Moore could not make a voluntary gift thereof to another individual. In the opinion in this Moore's Administrator case, Chief Justice Reece pointed out that the reason the non-transferability feature contained in the bonds and the pertinent Treasury Regulations was "...to encourage thrift and savings by small investors."

The reason for the non-transferability feature being valid, worthwhile and in accord with public policy, that particular feature was enforced by our Court of Appeals in its opinion above referred to.

I want to emphasize that the restriction is only against VOLUNTARY GIFT, sale, or pledge of bonds and does not serve to restrict the subjection of same to a constructive trust. A constructive trust of course, far from being voluntary, is imposed by the court against the wishes of the holder of the corpus in order to avoid an injustice, which is just the situation we have in the case at bar.

The reasoning in the cases cited *supra* recognizing the exceptions set out in the Treasury Department Regulations providing that no one can cash bonds except the registered owner is sound and fundamental.

But we have to look at the purpose of these Treasury Regulations to fairly evaluate them.

As set out in the Moore opinion, the purpose of restricting transferablility of Savings Bonds is two fold:

> "The Act of Congress and the Treasury Regulations had two objectives: (1) To obtain money for the United States Government; and (2) to encourage thrift and savings by small investors. The non-transferability feature w a s intended to accomplish the second objective, and for that reason the limitation on transfer was made all inclusive. That the limitation was intended to include transfers by gift is suggested by the regulation relative to creditors' rights and judicial proceedings which provides:
>
> "'A Savings Bond will be paid to, but not reissued in the name of, the person found entitled thereto THROUGH JUDICIAL PROCEEDINGS, (emphasis ours) upon presentation and surrender of the bond; Provided, however, that no such proceedings will be recognized if they would give effect to an attempted VOLUNTARY (emphasis o u r s) transfer of the bond or would defeat or impart the rights of survivorship conferred by the regulations in this part upon co-owners and beneficiaries.' Code of Federal Regulations, 1940, Supl. Title 31, sec. 315.17."

The purpose of saying then that no one can cash savings bonds except the registered owner is to encourage thrift. The Treasury Department certainly intended to encourage thrift among small investors. But it cannot be said that the Treasury Department intends to encourage thrift by a thief of funds stolen or illegally abstracted or obtained by fraud in violation of a confidential relationship and therefore subject to a con-

structive trust—it does not intend to encourage thrift on the part of the party at fault and thereby deprive the true owner of the bonds of his rightful proprietorship therein.

Otherwise, fundamental principals of public policy would be grossly violated. Otherwise, an absconder could invest illegal gains in savings bonds registered in his name or the name of some other person of his choice, his wife, for instance, or a friend or an accomplice or even an innocent third party and thereby deprive the person whose funds has been absconded with of all title thereto.

The Court is most respectfully urged to particularly note the wording of the passage in the Moore case, quoting the Code of Federal Regulations above:

> "A SAVINGS BOND WILL BE PAID TO...THE PERSON FOUND ENTITLED THERETO THROUGH JUDICIAL PROCEEDINGS."

Is not this Federal Regulation set forth in the Moore case absolutely conclusive? Does it not clearly recognize that a judicial determination of ownership of a bond is final and binding regardless of the name under which the bond was bought?

It cannot be denied that under our law a constructive trust can attach to cash under a proper showing of fraud.

In other words, Mr. John Henderson's cash money, before it was converted to bonds could certainly be the proper subject of a constructive trust; similarly, if the cash money were invested in bonds and then subsequently the bonds were cashed, the money so derived, if identifiable, could be the subject of a constructive trust in his favor. Is it not absurd to say that a constructive trust could attach to the cash before it was put in bonds, and, likewise, the proceeds from the bonds if they were in fact cashed, could be the subject of a constructive

trust, but that during the interim, that is, while the money was in the form of bonds rather than cash, the bonds themselves could not be the subject of a constructive trust? Really, in essence the whole matter is one of identification of funds and the constructive trust can attach to the funds, whatever form, whether it be cash or bonds. To hold otherwise is unrealistic, legalistic reasoning that cannot stand the light of logical examination.

In the case at bar the Petitioners are asking the Supreme Court of the United States to take jurisdiction of this case for the purpose of deciding that the Court of Appeals of Kentucky has no right to prevent fraud by declaring a constructive trust in favor of the real owner of Series E Bonds.

The Treasury Regulations quoted *supra* specifically authorize State Courts to enforce the rights of REAL owners to Savings Bonds even though the real owner may not be the registered owner. The courts throughout the land have consistantly exercised this right.

No Federal question is involved in this case.

The real question in this case then, it is respectfully submitted, does not involve any part of the statuatory situation nor any part of the Rules of the United States Supreme Court situation in which a writ of certiorari may normally be expected to issue.

CONCLUSION

It is respectfully urged that a constructive trust CAN be declared in United States Savings Bonds Series E, in favor of a defrauded person. In this case, John Henderson the defrauded person, was properly held by the Court of Appeals of Kentucky, to be the cestui que trust of the bonds purchased

with money stolen from him, and he is entitled to have the same cashed by the Treasury Department, on surrender thereof, they having already been properly endorsed by the registered surviving co-owners thereof.

WHEREFORE, Respondent respectfully prays that Petition for Writ of Certiorari herein be denied.

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Grady Building
Bowling Green, Kentucky

COUNSEL FOR RESPONDENT

FILED
JAN 15 1955
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

No. 109 October Term, 1954

IRVIN B. BEWLEY, Bowling Green, Ky.,
MRS. HELEN WITCHELL, Louisville, Ky.,
ELMER SANDERS, Louisville, Ky., ... *Petitioners,*

versus

JOHN HENDERSON, Bowling Green, Ky., ... *Respondent.*

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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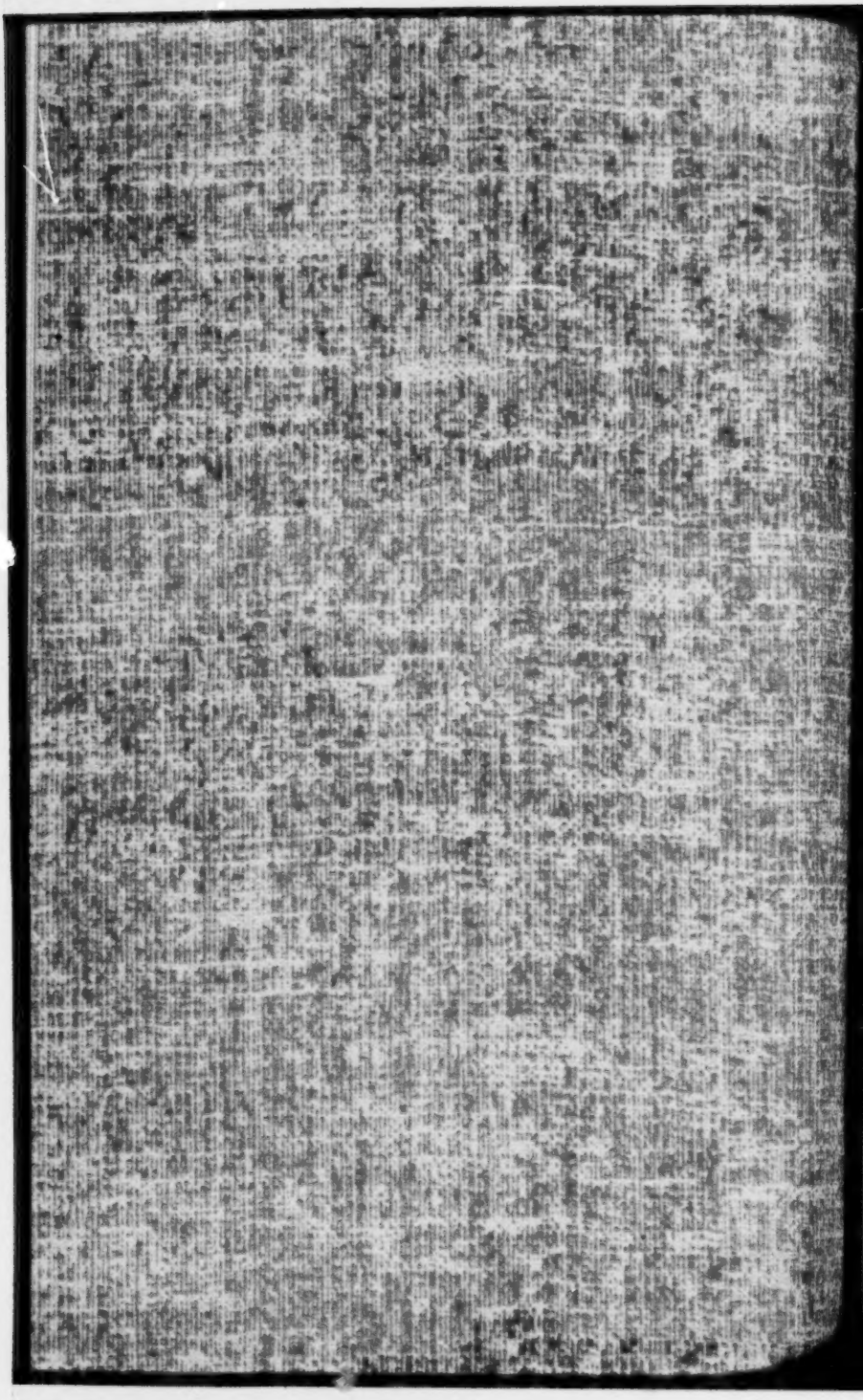

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

In addition to the authorities referred to in Respondent's Brief, filed on or about January 3, 1955, Respondent respectfully invites the Court's attention to the Annotation published in 37 A. L. R., 2d Series, Pages 1241 to 1243.

This Annotation under the heading "Effect of Fraud or Misconduct", makes specific reference to the Opinion of the Court of Appeals of Kentucky that is the subject of the Petition for the Writ of Certiorari in the case at bar. The recent opinions of the Courts of last resort of other states, to the general effect that a constructive trust may be set up by the judiciary in Series E. Savings Bonds and that the proceeds of those bonds may be paid to the beneficiary of such trusts, regardless of registration of the Bonds, in order to prevent fraud, are also referred to.

WHEREFORE Respondent renews his prayer for relief, as set forth in his original brief herein.

Respectfully submitted,

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Grady Building
Bowling Green, Kentucky
Counsel for Respondent